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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 188

JAMES C. DAVIS, FEDERAL AGENT, PETITIONER,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JUNE 22, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,319)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No.

JAMES C. DAVIS, FEDERAL AGENT, PETITIONER,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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IN SUPREME COURT OF TEXAS

JAMES C. DAVIS, Federal Agent,

vs.

Mrs. MARY PRESTON, Administratrix

PRÆCIPE—Filed May 17, 1929

Mr. F. T. Connerly, Clerk for the Supreme Court of Texas, Austin, Texas.

DEAR SIR: We are applying for a writ of certiorari in the above case from the Supreme Court of the United States to the Supreme Court of Texas. We now request you to insert in the record which you are preparing the following as near as may be in the order here stated:

1. This Præcipe.
2. The record sent up to your Court from the Court of Civil Appeals.
3. The Statement of Facts sent up to your Court from the Court of Civil Appeals.
4. The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.
5. The opinion of the Court of Civil Appeals in this case.
6. The motion for Rehearing which was filed in the Court of Civil Appeals.
7. The Order of the Court of Civil Appeals overruling the said Motion for Rehearing.
8. Application for Writ of Error from the Supreme Court of Texas to the Court of Civil Appeals which was filed in that Court.

[fol. d] 9. The answer, if any, to the application for Writ of Error from the Supreme Court of Texas.

10. The Order of the Supreme Court of Texas granting the writ of error.
11. The judgment of the Supreme Court of Texas.
12. The opinion of the Supreme Court of Texas.
13. The motion for rehearing which was filed in the Supreme Court of Texas.
14. The Order of the Supreme Court of Texas overruling the motion for rehearing which was filed therein.

15. The petition addressed to the Supreme Court of Texas for a stay of the mandate pending the attempted removal of the cause to the Supreme Court of the United States.

16. The order by the Supreme Court of Texas on the petition for a stay of the mandate.

17. The bond approved by a Justice of the Supreme Court of Texas ordering a stay of the mandate.

18. Your Certificate in ample form to all of the above.

Yours respectfully, James C. Davis, Federal Agent; Fidelity and Deposit Company of Maryland, by Andrews, Streetman, Logue & Mobley, and W. L. Cook, Their Attorneys of Record.

We accept service of the above Præcipe.

Mrs. Mary Preston, Administratrix, by J. W. Wayman and Robt. L. Cole, Atty. of Record.

[File endorsement omitted.]

[fol. 1] [Caption omitted]

[fol. 2] In District Court of Harris County, 80th Judicial District

Original Petition—Filed Feb. 26, 1920

To the Honorable Judge of said court:

Comes Mrs. Mary Preston, a feme sole, hereinafter styled plaintiff, complaining of Walker D. Hines, Director General of Railroads, United States Railroad Administration, and as the operator of and as the director general of Houston Belt and Terminal Railroad of Houston, Harris County, Texas, Hines being hereinafter styled defendant, and respectfully shows to the court:

First. That plaintiff is a resident citizen of Orleans Parish, Louisiana, and that defendant has local agents in Houston, Harris County, Texas, upon whom service of citation may be had.

Second. Plaintiff avers that she is the surviving wife of W. P. Preston, who was killed while in the employ of the

defendant on or about September 14th, 1919, and that she is the sole and only party entitled to prosecute a cause of action on account of the death of said W. P. Preston; that the parents of said W. P. Preston are both dea*th*; that he has no children and that he had no other relative in anywise dependent upon him for support save this plaintiff.

Third. For cause of action plaintiff avers that heretofore on, to-wit, the 14th day of September, 1919, and for a long time prior thereto, said W. P. Preston was in the employ of the defendant in the operation of the Houston Belt and Terminal Railroad as a switchman, working in the railway yards owned and operated in Houston, Harris County, Texas, by defendant; that a switching crew, of which he was one, in the course of their employment on the night of September 14th, 1919, were ordered and directed to take [fol. 3] certain passenger coaches from the Union Station in Houston and put the same on a certain track, the end of which abutted on McKinney Avenue; that in placing said cars on the track where they were to be stored; it was necessary, usual and customary for a member of the crew handling the cars to station himself at the end of such storage tract from crossing McKinney Avenue, and in order to give the necessary signal to the engine crew to stop the car or cars when they reached the end of the track, which as aforesaid ended or abutted on McKinney Avenue, a public and much traveled street in the City of Houston; on the night aforesaid said W. P. Preston in performing the duties in the switching crew known as the long field man, in accordance with custom and as he was directed and required to do, alighted from said train of cars when they crossed McKinney Avenue intending to station himself at the end of said track so as to give the necessary signals when to stop the cars when they were put on said track and pushed back to the end thereof at McKinney Avenue; that the place where he was required to get off of said moving cars was in the switch yards at Houston and at a place where brakemen and other train operatives were frequently required to get on and off of moving cars, it being in and a part of the net work of tracks forming the switch yards in the City of Houston maintained by the defendant; that being a place where train operatives were required to alight from moving cars at night time, defendant should have, in

the exercise of ordinary care, kept the same free of obstructions and made such place reasonably safe for employes when getting on and off of moving cars.

In this connection plaintiff avers that defendant, his agents, servants and employes had placed immediately adjacent to the track over which said cars were being switched, a number of steel rails and so close to the said track that when said W. P. Preston in getting off of the moving cars [fol. 4] at the McKinney street crossing, without knowing that said rails were there, stepped on and among the same, which caused him to trip or slip, thereby throwing him under said moving cars, causing his immediate death. Plaintiff avers that said W. P. Preston did not know, and in the exercise of ordinary care could not have known, that defendant had placed said rails in its said switch yard at the point where he was required to and did alight from said moving train, it being night time and impossible for him to detect the presence of said rails.

Fourth. Plaintiff avers that the death of her said husband was directly and proximately due to the wrongful acts, negligence, unskillfulness and default of defendant, his agents, servants and vice principals in this towit:

(a) That they did not exercise ordinary care in keeping the switch yard, and especially the place where said Preston was required to alight from said moving train, free of rails, which defendant knew, and in the exercise of ordinary care should have known, would trip and cause plaintiff to be thrown or fall under said moving cars;

(b) That they would not provide and furnish said W. P. Preston a reasonably safe place to work in the performance of his duties;

(c) That they failed to warn and advise said W. P. Preston that such rails and obstructions had been placed adjacent to the track upon which he was required in the exercise of ordinary care to alight from said moving cars.

Fifth. Plaintiff further alleges that at the time of the death of her said husband he was 29 years of age, was in good health, sober and industrious and well qualified as a [fol. 5] switchman; that for a long time prior to his death

he had been engaged as a switchman, for which employment he received the salary of One Hundred and Sixty Dollars ($160.00) per month, and could have continued to earn such amount with excellent prospects of promotion and receiving increased wages to the amount of Two Hundred and Fifty Dollars ($250.00) per month; that he had since his marriage to plaintiff cared for and supported her, provided her with the necessities and conveniences of life and would have continued to maintain her in a manner suitable to his station in life. In this connection plaintiff avers that she was dependent upon her said husband for her maintenance and support. She avers that by reason of the premises she has sustained actual damages in the sum of Forty Thousand Dollars ($40,000.00).

Wherefore plaintiff prays that defendant be cited in terms of the law, and that upon final hearing she have judgment for the sum of Forty Thousand Dollars ($40,000.00) with interest thereon at the rate of six (6) per cent per annum from September 14th, 1919, and she prays for such other and further relief, general and special, to which she may be entitled.

McDonald & Wayman, Attorneys for Plaintiff, Mary Preston.

[File endorsement omitted.]

[fol. 6] In District Court of Harris County

Summons and Sheriff's Return—Feb. 26, 1920

The State of Texas to the sheriff or any constable of Harris County, Greeting:

You are hereby commanded to summon Walker D. Hines, Director General of Railroads, United States Railroad Administration, and as the operator of and as the director general of Houston Belt and Terminal Railroad of Houston, Harris County, Texas, if to be found in your County, to be and appear at the next regular term of the District Court of Harris County, for the 80th Judicial District of

Texas, to be holden at the Court House in Houston, Harris County, Texas, on the 1st Monday in March 1920, being the 1st day of March 1920, then and there to answer the petition of

Mrs. Mary Preston, a feme sole, Plaintiff filed in this Court February 26th, 1920, and is No. 87829, on the Docket of said Court, exhibited against the said Walker D. Hines, Director General of Railroads, United States Railroad Administration, and as the operator of and as the director general of Houston Belt and Terminal Railroad of Houston, Harris County, Texas, wherein Plaintiff sues and prays Judgment; alleging: Pltff. avers that on 14th of Sept. 1919, and for a long — prior thereto, W. P. Preston was in employ of Houston Belt & Terminal Railroad as a switchman, working in the yards owned and operated by deft. That a switching crew of which he was one, were ordered on the night of Sept. 14th, 1919 to take certain coaches from the Union Station in Houston and put same on a certain track, the end of which abutted on McKinney Ave. (all more fully set out in plaintiff's Original petition, referred to herewith) W. P. Preston in performing the du- [fol. 7] ties in the switching crew known as the long field man, alighted from said train of cars when they crossed McKinney Ave., intending to station himself at the end of said track as to give the necessary signals (all more fully set out in pltff's original petn. referred to herewith). Pltff. avers that deft. his agents, etc., had placed immediately adjacent to the track over which said cars were being switched, a number of steel rails and so close to said track that when W. P. Preston in getting off the moving cars without knowing that said rails were there, stepped on and among same, which caused him to trip or slip, throwing him under said moving cars, causing his immediate death (all more fully set out in pltff's. original petn. referred to herewith). Pltff. avers that the death of her said hus. was the direct cause of the negligence of defts. his agents, etc. At time of said death, her hus. was earning $160.00 per month, and could have continued to earn such amount with excellent prospects of promotion. She avers that by reason of the premises she has sustained actual damages in sum of $40,000.00. Pltff. prays that on hearing she have judgment for $40,000.00, with int. thereon at rate of 6% per

annum from Sept. 14th, 1919, and she prays for such other relief, to which she may be entitled and for general and special relief and costs of Court.

A true copy of this writ you will deliver to the said Walker D. Hines, Director General of Railroads, United Railroad Administration, and as the operator of and as the director general of Houston Belt and Terminal Railroad of *of* Houston, Harris County, Texas,

Herein fail not, under penalty of the law, and of this writ make due return on the first day of the next Term of this court, after the issuance hereof, being the 1st day of March, 1920.

Issued February 26th, 1920.

[fol. 8] Witness O. M. Dulcos, Clerk of said Court, and the seal thereof, at office, in the City of Houston, Texas, this the 26th day of February, 1920.

O. M. Duclos, Clerk District Court, Harris County, Texas, by F. C. Bradt, Deputy.

Sheriff's Return

Received this writ on the 26th day of February, A. D. 1920, at 5.20 o'clock p. m. and executed the same in Houston, Harris County, Texas, on the 27th day of February, A. D. 1920, at 5 o'clock p. m. by summoning Walker D. Hines, Director General of Railroads, and Director General of the Houston Belt and Terminal Railroad the within named defendant by delivering to W. S. Clark Agent for said Walker D. Hines in person a true copy of this writ.

I actually and necessarily traveled — miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

T. A. Binford, Sheriff Harris County, Texas, by E. Legien, Deputy.

Fees:

Serving 1 copy	$.75
Mileage, 5 miles	.25
Total	$1.00

[fol. 9] In District Court of Harris County

No. 87829

Mrs. Mary Preston

vs.

Walker D. Hines, Director General

Motion to Substitute James C. Davis Federal Agent—Filed May 31, 1922

Comes plaintiff, Mrs. Mary Preston, and respectfully shows to the court that the President has, under the Transportation Act, designated James C. Davis as Federal Agent to be substituted in suits that were pending at the termination of Federal control; that under Sec. 206 (d) of the Transportation Act such suits so pending at the termination of Federal control should not abate, but are to be prosecuted to final judgment, substituting James C. Davis as Federal Agent.

Wherefore your petitioner prays that an order be made herein, substituting said Davis as defendant, and that she be permitted to prosecute this suit to a final judgment against him as the agent designated by the President under the Transportation Act.

McDonald & Wayman, Cole & Cole, Attorneys for Plaintiff.

[File endorsement omitted.]

In District Court of Harris County

[Title omitted]

Answer to Motion to Substitute—Filed May 31, 1922

Comes now James C. Davis, Federal Agent, and appearing herein only for the purpose of opposing the motion filed by plaintiff asking that said James C. Davis, Federal Agent, be substituted for the Director General of Railroads as

the party defendant, and would show to the court that said [fol. 10] motion should not be granted but should be denied for the following reasons:

(a) Subsequent to the determination of Federal control of railroads, as is judicially known to the court, Walker D. Hines was appointed Federal Agent by the President and afterwards resigned and John Barton Payne was appointed Federal Agent in his stead. Thereafter, John Barton Payne resigned and James C. Davis was appointed Federal Agent. This suit was originally filed against the Director General of Railroads and no substitution has ever been requested of the court until the motion now under consideration was filed, notwithstanding the fact that more than one year has elapsed since the retirement of John Barton Payne Federal Agent and the appointment and qualification of his successor, James C. Davis, and under the enactments of Congress such substitution cannot now be had, because in violation of the Federal Statute which controls.

(b) Furthermore, this suit cannot be prosecuted as against any Federal Agent if initiated as against such Federal Agent either by substitution or original action more than two years after determination of Federal control, and as is judicially known to the court, considerably more than two years has elapsed since the termination of Federal control and any effort to substitute the Federal Agent is barred by such statute which prescribes the time within which such actions may be brought and prosecuted.

Wherefore said James C. Davis, Federal Agent, moves the Court to deny the motion and also to abate the pending suit for lack of sufficient necessary parties defendant.

Andrews, Streetman, Logue & Mobley, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

ORDER GRANTING SUBSTITUTION

On this 31st day of May, 1922, came on to be heard the petition of plaintiff to substitute James C. Davis, Federal Agent, as defendant herein, and came the parties by their respective attorneys and submitted the matter to the court; and it appearing to the court after hearing the pleadings and the evidence that said substitution should be made;

It is therefore ordered, adjudged and decreed by the court that the said James C. Davis, Federal Agent, designated by the President as such pursuant to the Transportation Act, be and he is hereby substituted as defendant in the above entitled and numbered cause, and plaintiff is hereby authorized and permitted to substitute said James C. Davis, Federal Agent, as defendant, to which action said James C. Davis, Federal Agent, in open court duly excepts.

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

PLEA IN ABATEMENT—Filed Nov. 25, 1922

To said Honorable Court:

Comes now James C. Davis, Federal Agent, appearing herein in limine for the sole purpose in this connection of presenting his Plea in Abatement, and moves the Honor-
[fol. 12] able Court to abate this action as to said James C, Davis, Federal Agent, for the following reasons:

1

While it is true that a motion was made by Plaintiff's counsel in the month of May, 1922, for permission to substitute James C. Davis, Federal Agent, for Walker D. Hines, sued as Director General of Railroads, and that said motion was contested by the Attorneys for Walker D.

Hines, Director General, and that the Court, notwithstanding said contest, entered an order granting that James C. Davis, Federal Agent, be substituted for Walker D. Hines, Director General, nevertheless said James C. Davis, Federal Agent, now urges upon the Court the consideration that more than a year has elapsed subsequent to the retirement of John Barton Payne, Federal Agent, and more than two years had elapsed subsequent to the termination of Federal control before the motion was filed and presented in this Court for permission to substitute, and that therefore the substitution as now made in the First Amended Original petition of Plaintiff is without legal authority because the right thereto is barred by limitation. In this connection, it is shown that the Federal Statute requires that such substitution be made within one year from and after the retirement of the previous official, and furthermore that in any event, in view of the two year statute applicable to causes of action of this nature the Federal Agent, rather than the Director General, should have been sued within two years from and after the termination of Federal control, and it is not now appropriate to make the Federal Agent a party.

Wherefore, premises considered, it is prayed that this Plea in abatement be granted, and that as to James C. Davis, Federal Agent, this cause abate.

Andrews, Streetman, Logue & Mobley, Attorneys for said James C. Davis, Federal Agent.

[fol. 13] [File endorsement omitted.]

In District Court of Harris County

[Title omitted]

Order Overruling Plea in Abatement

Nov. 27, 1922.

Deft's plea in abatement overruled. Deft. excepts. Pltffs. granted leave to file 1st Amended Original Petition, and defendant granted leave to file 1st Amended Original Answer.

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

FIRST AMENDED PETITION—Filed Nov. 27, 1922

To the Honorable J. D. Harvey, judge of said court:

Comes Mrs. Mary Preston, a femme sole, hereinafter styled plaintiff, and leave of the court first had and obtained, files this her First Amended Petition, and complaining of James C. Davis, Federal Agent, as the substitute defendant in the place of Walker D. Hines, heretofore made defendant herein as Director General of Railroads, for the United States Railroad Administration, and as permitted by the order of this court entered herein on the 31st day of May, 1922; and complaining, as stated, of the said James C. Davis, as the Federal Agent of the defendant, Houston Belt & Terminal Railroad Company of Houston, Harris County, Texas, and of the United States Railroad Administration, said Davis being hereinafter styled defendant, and [fol. 14] respectfully shows to the court:

I

That plaintiff is a resident citizen of Orleans Parish, Louisiana, and that defendant has local agents in Houston, Harris County, Texas, upon whom service of citation may be had.

II

Plaintiff avers that she is the surviving wife of W. P. Preston, who was killed while in the employ of the defendant on or about September 14th, 1919, and that she is the sole and only party entitled to prosecute a cause of action on account of the death of said W. P. Preston; that the parents of said W. P. Preston are both dead; that he has no children and that he has no other relatives in anywise dependent upon him for support save this plaintiff.

III

For cause of action plaintiff avers that heretofore, on to-wit, the 14th day of September, 1919, and for a long time prior thereto, said W. P. Preston was in the employ of the

defendant in the operation of the Houston Belt and Terminal Railroad as a switchman, working in the railway yards owned and operated in Houston, Harris County, Texas, by defendant; that a switching crew, of which he was one, in the course of their employment on the night of September 14, 1919, were ordered and directed to take certain passenger coaches from the Union Station in Houston and put the same on a certain track, the end of which abutted on McKinney Avenue; that in placing said cars on the track where they were to be stored, it was necessary, usual and customary for a member of the crew handling the cars to station himself at the end of such storage track on McKinney Avenue to prevent the cars when switched onto said track from crossing McKinney Avenue, and in order to give the necessary signal to the engine crew to stop the car or [fol. 15] cars when they reached the end of the track, which as aforesaid ended or abutted on McKinney Avenue, a public and much traveled street in the City of Houston; on the night aforesaid W. P. Preston in performing the duties in the switching crew known as the long field man, in accordance with custom and as he was directed and required to do, alighted from said train of cars when they crossed McKinney Avenue intending to station himself at the end of said tract so as to give the necessary signals when to stop the cars when they were put on said track and pushed back to the end thereof at McKinney Avenue; that the place where he was required to get off of said moving cars was in the switch yards at Houston and at a place where brakemen and other train operatives were frequently required to get on and off of moving cars, it being in and a part of the net work of tracks forming the switch yards in the City of Houston maintained by the defendant; that being a place where train operatives were required to alight from moving cars at night time, defendant should have, in the exercise of ordinary care, kept the same free of obstructions and made such place reasonably safe for employes when getting on and off of moving cars.

In this connection plaintiff avers that defendant, his agents, servants and employes had placed immediately adjacent to the track over which said cars were being switched, a number of steel rails and so close to the said track that when said W. P. Preston in getting off of the

moving cars at the McKinney Street crossing, without knowing that said rails were there, stepped on and among the same, which caused him to trip or slip, thereby throwing him under said moving cars, causing his immediate death. Plaintiff avers that said W. P. Preston did not [fol. 16] know, and in the exercise of ordinary care could not have known, that defendant had placed said rails in its said switch yard at the point where he was required to and did alight from said moving train, it being night time and impossible for him to detect the presence of said rails.

IV

Plaintiff avers that the death of her said husband was directly and proximately due to the wrongful acts, negligence, unskillfulness and default of defendant, his agents, servants and vice principals in this towit:

(a) That they did not exercise ordinary care in keeping the switch yard, and especially the place where said Preston was required to alight from said moving train, free of rails which defendant knew, and in the exercise of ordinary care should have known, would trip and cause plaintiff to be thrown or fall under said moving cars;

(b) That they would not provide and furnish said W. P. Preston a reasonably safe place to work in the performance of his duties;

(c) That they failed to warn and advise said W. P. Preston that such rails and obstructions had been placed adjacent to the track upon which he was required in the exercise of ordinary care to alight from said moving cars.

V

Plaintiff further alleges that at the time of the death of her said husband he was 29 years of age, was in good health, sober and industrious and well qualified as a switchman; that for a long time prior to his death he had been engaged as a switchman, for which employment he received [fol. 17] the salary of One Hundred and Sixty Dollars ($160.00) per month, and could have continued to earn that amount with excellent prospects of promotion and receiv-

ing increased wages to the amount of Two Hundred and Fifty ($250.00) Dollars per month; that he had since his marriage to plaintiff cared for and supported her, provided her with the necessities and conveniences of life and would have continued to maintain her in a manner suitable to her station in life. In this connection plaintiff avers that she was dependent upon her said husband for her maintenance and support. She avers that by reason of the premises she has sustained actual damages in the sum of Forty Thousand ($40,000.00) Dollars.

Wherefore plaintiff prays that defendant be cited in terms of the law, and that upon final hearing she have judgment for the sum of Forty Thousand ($40,000.00) Dollars, with interest thereon at the rate of Six (6%) per cent per annum from September 14th, 1919, and she prays for such other and further relief, general and special, to which she may be entitled.

McDonald & Wayman, Cole & Cole, Attorneys for Plaintiff, Mrs. Mary Preston.

[File endorsement omitted.]

In District Court of Harris County

[Title omitted]

First Amended Answer—Filed Nov. 27, 1922

To said Honorable Court:

Comes now James C. Davis, Federal Agent, reserving all and singular his exceptions to the Court's action in overruling his Plea in Abatement heretofore filed and presented [fol. 18] to the Court, and in no sense waiving said Plea, now files this his answer to Plaintiff's First Amended Original Petition, wherein and whereby for the first time this Defendant appears as a party, and so answering says:

1

This Defendant demurs generally to the petition and pleading of Plaintiff on file herein, and says that the same

is insufficient to require answer of this Defendant or to entitle Plaintiff to the relief sought, and of this he prays judgment of the Court.

2

Waiving nothing, but insisting upon all and singular his rights under his Plea in Abatement and under the general demurrer aforesaid, this Defendant specially excepts to Plaintiff's petition, in that it conclusively appears from the pleadings in this case that any right of action plaintiff avers had against James C. Davis, Federal Agent, is barred not only under the one year statute of limitations, under and by reason of which it was required that Plaintiff cause to be substituted James C. Davis, Federal Agent, within one year from and after the retirement of John Barton Payne, Federal Agent; but also under the two year statute of limitations applicable to causes of action of this nature, in view of the fact appearing from the pleadings that it has been more than two years since the termination of Federal control and this suit as originally filed against Walker D. Hines, Director General of Railroads, continued to be a suit against said Director General of Railroads, without amendment or substitution, until the month of May, 1922, and James C. Davis, Federal Agent, was not even suggested in this Court by motion, or otherwise, as a party Defendant to Plaintiff's cause of action until the said month of May, 1922, more than two years subsequent [fol. 19] to the termination of Federal control, as the Court judicially knows.

3

Answering herein, if answer be required, this Defendant denies all and singular the material allegations in Plaintiff's petition contained, and says that the same are not true in whole or in part, and of this he puts himself upon the country.

4

For further and special answer herein, if answer be required, this Defendant would show to the Court that if the Plaintiff had any action at any time against the Federal Agent, under the appointment of the President of the

United States, and pursuant to the statute creating said office of Federal Agent, such action is barred under the one year Federal Statute, which requires a substitution of the Federal Agent for the Director General of Railroads within one year from and after the retirement of the previous Federal Agent; it appearing that John Barton Payne retired and James C. Davis was appointed and qualified more than a year before any effort to make a substitution. It is likewise barred under the two year statute of limitations applicable to causes of action of this nature, it appearing that more than two years elapsed from and after the termination of Federal control before any effort was made to substitute James C. Davis, Federal Agent, or any other Federal Agent for Walker D. Hines, Director General, who was originally sued in this case.

5

For further and special answer herein, if required, this defendant would show to the court that at the time plaintiff's decedent met his death he was engaged in interstate commerce, and if in truth and in fact his death was caused by rail or rails mentioned in plaintiff's petition, in such [fol. 20] event plaintiff assumed the risk of all hazards resulting therefrom, because he reasonably knew, or must necessarily have known in the course of his employment and in the ordinary performance of his duties, that such rails were in position at the place in question, said rails having been placed in position for use in the track a sufficient length of time previously that plaintiff must necessarily have known of their presence.

6

For further and special answer herein, if answer *he* required, defendant specifically denies that plaintiff's decedent stumbled over the rail mentioned in plaintiff's petition, and as a consequence met his death. In this connection defendant alleges that the death of plaintiff's decedent occurred on the night of September 14, 1919, which was the date when what is known as the Corpus Christi storm

occurred and as is generally known in this vicinity on that night and at the time mentioned in plaintiff's petition the wind was blowing a gale of great severity even in Houston. Furthermore, defendant alleges that plaintiff's decedent was last seen going toward the end of the passenger coach in which he had been riding and at that time was wearing a rain coat and that, while no person saw him fall, and no one can testify how or in what manner, he met his death, nevertheless it reasonably appears that, in view of the storm which was raging and of the fact that plaintiff's decedent was wearing a rain coat, he was either caused to lose his balance by the wind or the wind whipped his rain coat around some portion of the equipment in such way as to cause him to fall or to entangle him and make him miss his footing or drag him underneath the train; or in some other manner easily imagined, but not known, plaintiff's decedent could have met his death without having come in contract with said rail. In this connection defendant says that in no event can it be shown that said death was caused [fol. 21] by negligence of the Director General, or of his servants, agents or employees, nor is there any reason to believe from any source whatsoever that any such negligence in any manner contributed to such death.

Wherefore, premises considered, this defendant prays that plaintiff take nothing by her suit, and that the defendant go hence without day and recover his costs.

Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

[File endorsement omitted.]

In District Court of Harris County

[Title omitted]

Motion for Leave to File Trial Amendment—Filed Nov. 28, 1922

To the Honorable J. D. Harvey, judge of said court:

Comes Mrs. Mary Preston, a feme sole, and moves the court for leave to file a Trial Amendment in this cause, by

her as the Temporary Administratrix of the Estate of W. P. Preston, deceased; and as grounds for this motion, respectfully shows the court:

I

That the defendant in this cause on the date that the cause went to trial, filed herein an Amended Original Answer, where, for the first time, although this case has been pending on the docket of this court since the — day of ——, 19—, he raised the question that the plaintiff's deceased husband was engaged in performing services on a train which was being used in interstate commerce at the time of his death; that at the time plaintiff announced ready it did not occur to her counsel, on the suddenness of the raising of the question, that the matter of proper parties might [fol. 22] be involved under facts so alleged in the defendant's said amended pleading; but such question has occurred to counsel since they announced ready, and some evidence having been offered tending to show that such question might be in the case, counsel have since they rested, for the first time, had opportunity since it occurred to them, to investigate the question, and they have reached the conclusion that it would be the safer practice to have plaintiff qualify as Temporary Administratrix and personal representative of the estate of her husband, W. P. Preston, deceased, and file a trial amendment herein asserting her rights in such capacity; and pursuant to such conclusion, she has been legally and duly appointed and has qualified in such capacity, under an order of the County Judge of Harris County, Texas, with full authority to appear herein and prosecute this cause to final judgment in such capacity.

Plaintiff makes known that no injustice or prejudice will occur by the granting of such leave at this time because such amendment does not change the issues, or the proof in support thereof, and its filing would facilitate and expedite rather than retard justice.

Wherefore she prays that she be permitted to file the accompanying trial amendment, and for such orders in this connection as to the court may seem proper.

McDonald & Wayman, Cole & Cole, Attys. for Plaintiff.

[fol. 23] [File endorsement omitted]

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO FILE TRIAL AMENDMENT

Nov. 28, 1922.

Pltff. granted leave to file trial amendment. Deft. excepts.

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

PLAINTIFF'S TRIAL AMENDMENT—Filed Nov. 28, 1922

To the Honorable J. D. Harvey, judge of said court:

Comes now Mary Preston, Temporary Administratrix of the estate of W. P. Preston, deceased, hereinafter called plaintiff, and leave of the court first had and obtained, files this in the nature of a trial amendment, and complaining of the said Sam C. Davis, as Federal Agent, hereinafter called defendant, respectfully shows the court:

[fol. 24] I

That plaintiff is the duly and legally qualified temporary administratrix and personal representative of the estate of W. P. Preston, deceased, under appointment of the County Court of Harris County, Texas; under which order she has full power and authority to appear herein and to prosecute this cause as shown by the duly certified order of such county court of Harris County, Texas, hereto attached and made a part hereof, as Exhibit "A" for all purposes.

II

That plaintiff in such representative capacity hereby, by way of alternative allegations, adopts, reiterates and reaffirms all of the allegations in the original petition and first amended original petition filed herein by her in her

individual capacity, the same as if said allegations were set out and reaverred here in haec verba; and by way of an alternative allegation asserts and alleges that her deceased husband at the time of his death was engaged in the performance of duties on a train of cars, which at the time were performing a journey or engaged in interstate commerce; and that if it should be found that plaintiff is not entitled to recover in the capacity in which she brought this suit, that then she is entitled to recover, under the same allegations and proof made in support thereof, in her representative capacity as hereinabove alleged.

Wherefore plaintiff prays in the alternative, that if she does not recover herein in her individual capacity, that she be permitted to recover herein in her representative capacity as temporary administratrix of the estate of W. P. Preston, deceased; and for all such other, further, general and special relief, both in law and in equity, as she may be entitled [fol. 25] to under all the facts alleged and proof adduced in support thereof, and as in duty bound she will ever pray.

McDonald & Wayman, Cole & Cole, Attorneys for Plaintiff.

[File endorsement omitted.]

In District Court of Harris County

[Title omitted]

Answer to Trial Amendment—Filed Nov. 29, 1922

Comes now James C. Davis, Federal Agent, and heretofore made a party in this cause under the Court's order of substitution over the exceptions and objections of said James C. Davis, Federal Agent, and now in response to the trial amendment filed under leave of the court whereby Mrs. Mary Preston sues as temporary administratrix of the estate of W. P. Preston, deceased, would show to the court as follows:

1

Waiving nothing, and still insisting upon his plea in abatement, heretofore presented, James C. Davis, Federal

Agent, demurs generally to the allegations contained in said trial amendment, and says that the same are wholly insufficient in law for Mrs. Mary Preston, as temporary administratrix of the estate of W. P. Preston, deceased, to recover any amount whatsoever of this defendant on account of the death of the said W. P. Preston, and of this prays judgment of the court.

2

Waiving nothing, and reserving all and singular its exceptions to the Court's action in overruling its plea in [fol. 26] abatement and the general demurrer aforesaid, James C. Davis, Federal Agent, specially excepts to said trial amendment and shows to the court that the same is insufficient as a basis for a recovery by the said Mrs. Mary Preston, as temporary administratrix of the estate of W. P. Preston, deceased, because it conclusively appears as a matter of law from the pleadings heretofore filed in this case and from the docket entries made by the court that James C. Davis, Federal Agent, was not made a party to this cause by any amended pleading until Monday, November 27, 1922, and that there was no authority for the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General, who had been originally sued in this case during the period of federal control of railroads, until the month of May, 1922, at which time pursuant to a motion filed in behalf of the plaintiff, Mrs. Mary Preston, individually, and not as administratrix, the Court entered an order authorizing the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General, in the suit as it was at that time pending. But inasmuch as Mrs. Mary Preston was not then the appointed and qualified administratrix of the estate of W. P. Preston, deceased, and was not then suing in that capacity, and was not then in that capacity requesting the court for permission to substitute James C. Davis as Federal Agent, it now conclusively appears as a matter of law that the trial amendment, now filed under the Court's leave, presents an entirely new cause of action, being by an entirely new party against an entirely new defendant. Being a new cause of action brought against the Federal Agent, it is initiated too late in view of Section 206 (a) of the Transportation Act of 1920 enacted

by Congress, which requires that any such action must necessarily be brought not later than two years from the date of the passage of said statute.

[fol. 27] Waiving nothing, and insisting upon all and singular his exceptions, James C. Davis, Federal Agent, further specially excepts to said trial amendment, and says that same is insufficient as a basis for any cause of action by and in behalf of Mrs. Mary Preston, as temporary administratrix of the estate of W. P. Preston, deceased, for the reason that having not previously qualified as such administratrix her cause of action, if any, accrued immediately upon such qualification, and not before, and was not a cause of action intended to be covered and provided for by the 1920 Transportation Act, especially since the appointment and qualification did not occur within the period limited by said statute.

4

Waiving nothing, James C. Davis, Federal Agent, adopts and reiterates all and singular its exceptions and pleas in bar found in his pleading now on file, and prays that plaintiff take nothing, individually, or as temporary administratrix, and that defendant go hence without day and recover his costs.

Andrews, Streetman, Loge & Mobley, Attorneys for said Defendant.

In District Court of Harris County

[Title omitted]

Charge to Jury—Filed Nov. 29, 1922

Gentlemen of the Jury: Upon proper request being made therefor, this case is submitted to you upon Special Issues in the form of questions propounded to you, each of which questions you will answer fully in writing:

[fol. 28] As to the law applicable to the facts of this case, you shall find them to be from the evidence, you are instructed as follows:

"Negligence," as the term is used in this charge, in its legal signification, is the failure to use ordinary care, and "ordinary care," as the term is used in this charge in its legal signification, is the care that a person of ordinary prudence would use under the same or similar circumstances.

"Proximate Cause," as the term is used in this charge, in its legal signification, is a cause which, in a natural and continuous sequence, produces an injury; but in order to warrant a finding that "negligence" is the "proximate cause" of an injury it must appear from the evidence that the injury, or some like injury, was the natural and probable consequence of the "negligence" and ought to have been foreseen as a result likely to occur, in the light of the attending circumstances.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony.

The burden of proof is on the defendant to establish by facts necessary to be proven to entitle her to recover by a preponderance of the evidence.

The burden of the proof is on the defendant to establish a preponderance of evidence the defense of assumed risk as plead by it.

Guided by the foregoing definitions and instructions, you will answer the following special issues submitted to you:

Special Issue No. 1: Did W. P. Preston's foot or feet, at or about the time and place alleged, strike against or come in contact with a certain loose rail or rails, shown by the evidence to have been lying on defendant's roadbed?

[fol. 29] Answer "Yes" or "No," as you find the fact to be.

If you have answered the foregoing Special Issue No. 1, "Yes," then answer the following

Special Issue No. II: Did such striking against or coming in contact with such rail or rails cause the said Preston to stumble and fall beneath the moving train where he met his death?

Answer "Yes" or "No," as you find the fact to be.

If you have answered the foregoing Special Issue "Yes," then answer the following.

Special Issue No. III: Did the placing and leaving of loose railroad rails in the place and in the position, on the

defendant's roadbed, as shown by the evidence in this case to have been so placed and left, constitute "negligence" on the part of the defendant, his servants, agents or employes, as the term "negligence" has been defined for you.

Answer "Yes" or "No," as you find the fact to be.

Did W. P. Preston assume the risk of being injured by reason of the rail in question.

Answer "Yes" or "no" as you find the fact to be.

In connection with the foregoing special issue you are instructed that the said W. P. Preston owed no duty of inspection to ascertain the presence and location of the rail in question and would only be held to have assumed the risk of being injured by reason of said rail or rails in event he had actual knowledge thereof and that the same was dangerous, or in the event he would have learned thereof in the course of the discharge of his duties, by the exercise of that ordinary circumspection which a prudent man would have used under the same or similar circumstances and in event you find that he did have actual knowledge of the presence and location of said rail and of the fact that it was dangerous, or in the event you find that he would have learned of the same by the exercise of that ordinary circumspection which a prudent man would have exercised [fol. 30] under the same or similar circustances, you will answer the foregoing special issue "Yes," otherwise you will answer it "No."

Special Issue No. V: Was the death of W. P. Preston the result of an accident?

Answer "Yes" or "No" as you find the fact to be.

In connection with the foregoing special issue, you are charged that by "accident" is meant such an unexpected catastrophe as occurs without anyone being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done or omitting to do the particular thing that caused such casualty.

Bearing in mind this definition of an accident you will answer the foregoing Special Issue

Special Issue No. VI: In order that the court may enter judgment for damages, if any, if he shall be of opinion that the plaintiff is entitled thereto upon the return of your findings herein, it is necessary for you to assess the damages, if any, sustained by the plaintiff, and in doing so, you will

assess same at such a sum as if paid in hand at this time, would fairly, and justly compensate her for the pecuniary benefits, if any, which she had a reasonable expectation of receiving from the deceased during his lifetime, stating the amount you find, if any; however, you will not take into consideration, nor allow anything to the plaintiff by way of compensation on account of sorrow, mental distress or for loss of society or companionship, but should limit said pecuniary loss to the money value of deceased to plaintiff had he continued to live.

You will answer stating the amount.

J. D. Harvey, Judge.

[File endorsement omitted.]

[fol. 31] In District Court of Harris County

[Title omitted]

Plaintiff's Requested Charge—Filed Nov. 29, 1922

Comes the plaintiff and asks the court to give the jury the following charge:

Gentlemen of the Jury: The court instructs you that while the plaintiff must prove the facts alleged by her on which she relies for recovery by a preponderance of the evidence, still the proof need not be the direct evidence of persons who saw the occurrence sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the evidence in the case, constitute a preponderance of the evidence.

J. D. Harvey, Judge Presiding.

Requested by McDonald, Cole & Cole, Attorneys for Plaintiff.

[File endorsement omitted.]

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

DEFENDANT'S SPECIAL ISSUE No. 3—Filed Nov. 28, 1922

Special Issue No. 3 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the force of the wind, with or without other contributing causes?

[fol. 32] Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Loge & Mobley, Attorneys for said Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

VERDICT—Filed Nov. 29, 1922

We, the jury, find verdict on the several special issues submitted to us as follows:

To the special issues submitted in the general charge of the court we answer as follows:

Special Issue No. 1: Yes.
Special Issue No. 2: Yes.
Special Issue No. 3: Yes.
Special Issue No. 4: No.
Special Issue No. 5: No.
Special Issue No. 6: $3,750.00.

To the Special Issues submitted by the court at request of defendant we make answers as follows:

To Issue No. 3 we answer: No.
To Issue No. 4 we answer: No.
To Issue No. 5 we answer: No.

To Issue No. 6 we answer: No.
[fol. 33] To Issue No. 7 we answer: No.
To Issue No. 8 we answer: No.
To Issue No. 9 we answer: No.
To Issue No. 10 we answer: No.

E. H. Hammond, Foreman.

[File endorsement omitted.]

In District Court of Harris County

[Title omitted]

Defendant's Requested Instruction #1—Filed Nov. 28, 1922

Special Instruction No. 1 Requested by the Defendant

Gentlemen of the Jury: The Court instructs you in this case that the plaintiff has not shown herself entitled to recover, and you will therefore return your verdict in favor of the defendant, James C. Davis, Federal Agent.

Refused.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

[File endorsement omitted.]

[fol. 34] In District Court of Harris County

[Titles omitted]

Defendant's Special Issues—Filed Nov. 28, 1922

The Defendant, James C. Davis, Federal Agent, specially requests the court to submit to the jury the issue of inevitable accident in this case. Attached hereto is a sug-

gested form for the issue, but the request for the issue is made irrespective of form.

Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

Special Issue No. 1 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston the result of an inevitable accident?

Answer "yes" or "no," as you find the facts to be.

In this connection you are told that when an event takes place the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental, and if you are unable to find from the preponderance of the evidence the real cause of the death of W. P. Preston, your answer to this question must be in the affirmative.

Refused.

Harvey, Judge.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

[File endorsement omitted.]

[fol. 35] Special Issue No. 2 Requested by the Defendant

GENTLEMEN OF THE JURY: Did W. P. Preston assume the risk of being injured by reason of the rail in question *of the rail in question*?

Answer "Yes" or "No," as you find the fact to be.

In this connection you are told that you need not answer this question unless you have found that Preston's death was caused by the rail in question. You are furthermore told that Preston must be held to have known all that he would have discovered in the exercise of that circumspection that a prudent man would use in the particular employment, and if he knew or reasonably must have known in the exercise of that degree of circumspection of the presence of the loose rail and that it was dangerous, in such event he assumed the risk, and your answer should be in the affirmative.

Refused. Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

Special Issue No. 4 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston [fol. 36] proximately caused by the fact that the vestibule door of the car from which he was alighting, or preparing to alight, fell upon or against him, causing him to lose his balance,

Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

Special Issue No. 5 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that the handhold of the car from which he was alighting on the occasion in question was wet on account of the rain causing him to slip and fall?

Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said defendant.

[fol. 37] Special Issue No. 6 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that in alighting from the train on the occasion in question he slipped on the wet boards of the McKinney crossing and was caused to lose his balance and fall under or against the moving train?

Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for the Defendant.

Special Issue No. 7 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that he had on a rain coat,

coupled with the further fact that a gale was blowing directly toward the train on the side from which he attempted to alight on the occasion in question?

[fol. 38] Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

Special Issue No. 8 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that he had on gloves coupled with the further facts that the handhold of the car from which he was alighting was wet and that a strong gale was blowing directly toward the side of the train from which he was alighting, causing him to slip his hold and to lose his balance and fall?

Answer "Yes" or "No," as you find the facts to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for the Defendant.

[fol. 39] Special Issue No. 9 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that the steps from which he alighted were wet on account of the rain, causing him to slip and lose his balance, coupled with the further fact that a wind of some violence and in gusts was blowing directly toward the side of the train from which he attempted to alight on the occasion in question?

Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

Special Issue No. 10 Requested by the Defendant

GENTLEMEN OF THE JURY: Was the death of W. P. Preston proximately caused by the fact that his rain coat caught on

some part of the vestibule door or other part of the coach from which he was alighting?

Answer "Yes" or "No," as you find the fact to be.

Given.

Harvey, Judge Presiding.

[fol. 40] Requested by Andrews, Streetman, Logue & Mobley, Attorneys for said Defendant.

In District Court of Harris County

[Title omitted]

Defendant's Exceptions to Court's Charge—Filed Nov. 29, 1922

The defendant James C. Davis, Federal Agent, excepts to the charge of the court as tendered, upon the following grounds:

I

The evidence is wholly insufficient as a matter of law to take this case to the jury, there being nothing from which a jury could reasonably find the manner in which plaintiff's decedent met his death, or find that said death was proximately caused by negligence of the Director General, his agents or servants.

II

As a matter of law the entire cause of action by Mrs. Mary Preston as Administratrix against James C. Davis, Federal Agent, is barred by limitation, and the Court should so hold.

III

Special Issue No. III is erroneous because not peculiarly related to the rail, which plaintiff's counsel undertakes to argue was the cause of the death of plaintiff's decedent.

IV

In relation to the issue of assumed risk is erroneous in that the portions thereof from the beginning of the words

"in connection with" to and inclusive of "or similar circumstances" constitutes an argument of the case in behalf [fol. 41] of the plaintiffs on the issue of assumed risk; the remainder of said paragraph presenting really the essentials insofar as the jury needs to be advised concerning the nature of this issue of assumed risk offered as a defense by the Federal Agent. The whole paragraph therefore is argumentative and prejudicial and deprives the defendant of the issue of assumed risk.

V

Special Issue No. 5 submitting the issue of an accident presents a definition which, though correct in application to an entirely different state of facts, is incorrect and misleading as applied to the state of facts here, inasmuch as we are here dealing with a situation where it is difficult to determine just how the decedent met his death, and it having been clearly indicated in the authorities that where a jury is unable to determine the cause of an accident, they must then, and the Court will instruct them to, decide that such was an unavoidable accident.

VI

The court erred in not giving the issues requested by the defense insofar as said issues have by the Court been refused.

We except to the giving of plaintiff's special charge on circumstantial evidence, on the ground that it is on the weight of the evidence, is argumentative and lends undue emphasis to phases of plaintiff's case, thereby prejudicing the defense.

Andrews, Streetman, Logue & Mobley, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 42] IN DISTRICT COURT OF HARRIS COUNTY

No. 87829

MRS. MARY PRESTON

vs.

WALKER D. HINES

JUDGMENT

Be it remembered that on the 27th day of November, A. D. 1922, the above numbered and entitled cause came on to be heard, whereupon came the plaintiff in person and by counsel, and the defendant by counsel, and announced ready for trial; and a jury having been demanded, thereupon came twelve good and lawful men, towit: E. H. Hammond and eleven others, who being duly impaneled and sworn, and having heard the pleadings and the evidence and received the charge of the court and heard the argument of counsel, thereafter on towit, the 29th day of November, A. D. 1922 returned into open court their verdict on special issues, which verdict the court finds and construes to be in favor of plaintiff and against the defendant and assures plaintiffs damages at the sum of $3,750.00, whereupon the court having received said verdict and considering same adjudges the law and facts to be with plaintiff and assesses her damages at $3,750.00 in accordance with said verdict.

It is therefore ordered, adjudged, and decreed by the court, upon the verdict of the jury upon the issues so submitted to them, and upon the evidence, that the plaintiff Mary Preston, as temporary administratrix and personal representative of the estate of W. P. Preston, deceased, a resident of New Orleans, Louisiana, do have and recover of and from the defendant, James C. Davis, Federal Agent, and Successor under the appointment of the president, pursuant to the enactment of Congress of John Barton Payne, Director General of Railroads during the period of Federal Control, including the Houston Belt & Terminal Railway Company, the full sum of Thirty-seven Hundred and [fols. 43 & 44] Fifty ($3,750.00) Dollars together with inter-

est hereon from the 29th day of November, 1922, until paid, at the rate of six (6%) per cent per annum and together with all costs of court, for all of which let execution issue.

It is further ordered and decreed by the court that the plaintiff in her individual capacity take nothing herein.

To which action of the court in rendering judgment against him, the defendant, James C. Davis, Federal Agent, did then and there in open court duly except and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District at Galveston, in Galveston County, Texas, and he is hereby allowed by the court ninety (90) days time from this date to prepare and have approved and filed his statement of facts and bills of exception.

Cost bond on appeal for $1,000.00, and filed December 28, 1922, omitted in printing.

[fol. 45] In District Court of Harris County

[Title omitted]

Assignments of Error—Filed Mar. 14, 1923

Comes now James C. Davis, Federal Agent and defendant in the above styled and numbered cause in the trial court, being appellant in the Court of Civil Appeals, and files the following assignments of error upon which he expects to rely as the grounds for reversal of the trial court's judgment:

First Assignment of Error

The trial court erred to the prejudice of appellant in ordering and permitting the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, previously sued as Director General of Railroads, over the objections and exceptions of the said James C. Davis, Federal Agent, acting by and through his attorneys of record.

Second Assignment of Error

The trial court erred to the prejudice of appellant in overruling and in not sustaining his plea in abatement regularly filed and presented, wherein James C. Davis, Federal Agent, prayed that the cause abate as to any cause of action asserted by plaintiff as against himself as Federal Agent.

[fol. 46] Third Assignment of Error

The trial court erred to the prejudice of appellant in permitting over the objections and exceptions of appellant, the filing by plaintiff below of a trial amendment wherein and whereby plaintiff, for the first time, asserted any right of action in her capacity as administratrix of the estate of her deceased husband and, for the first time in that capacity, claimed any right of recovery against James C. Davis, Federal Agent.

Fourth Assignment of Error

The trial court erred to the prejudice of appellant in refusing the request of the defendant James C. Davis, Federal Agent, for a peremptory instruction to the jury in his behalf upon the grounds that any right of action in behalf of the plaintiff as administratrix of the estate of her deceased husband was barred by the two-year statute of limitation.

Fifth Assignment of Error

The trial court erred to the prejudice of appellant in refusing and in not granting the request for a peremptory instruction in behalf of James C. Davis, Federal Agent, upon the ground that plaintiff had not complied with the statutory requisites in bringing about the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads, originally sued; it appearing that, in the month of May, 1922, Mrs. Mary Preston, suing individually Walker D. Hines, Director General of Railroads, and, acting by her attorneys of record, filed and presented a petition for the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director Gen-

eral of Railroads, and that said motion was granted over [fol. 47] the objections and exceptions of the defendant, and that such action, as and when taken, was taken more than a year subseqent to the retirement of John Barton Payne, who had been appointed as Federal Agent by the President of the United States pursuant to the enactment of Congress prescribing methods of winding up the affairs of the United States Federal Administration of Railroads and more than two years subsequent to the termination of Federal control; and that, for the first time, Mrs. Mary Preston, as administratrix, appeared in this case at the November term of the trial court, being permitted to file a trial amendment; consequently, the substitution of James C. Davis, Federal Agent, was not in compliance with the Transportation Act of 1920, and the suit by Mrs. Mary Preston, as administratrix, together with such substitution, did not constitute a compliance with the requisites of the recent enactments of Congress concerning causes brought under the terms and provisions of the 1920 Transportation Act nor a compliance with the substitution provisions thereof; the requisites of this more recent enactment being such that, in order to take advantage of its provisions, the original action must have been properly brought prior to the lapse of the one-year limitation period.

Sixth Assignment of Error

The trial court erred to the prejudice of appellant in not instructing the jury peremptorily in behalf of James C. Davis, Federal Agent, upon his request, because it conclusively appeared, upon the trial, that the Court had no jurisdiction to render any judgment against James C. Davis, Federal Agent, in behalf of Mrs. Mary Preston, ad- [fol. 48] ministratrix of the estate of her deceased husband, the jurisdiction being deficient in respect to a failure to comply with the Federal Statutes relating to the manner of suing the Federal Agent upon causes of action similar to the one involved here.

Seventh Assignment of Error

The trial court erred to the prejudice of appellant in refusing the request of James C. Davis, Federal Agent, for a

peremptory instruction, because it wholly failed to appear from any evidence that the death of plaintiff's husband was proximately caused by any negligence of the Director General of Railroads, or any of his agents, servants or employes.

Andrews, Streetman, Logue & Mobley, Attorneys for Appellant, James C. Davis, General Agent.

[File endorsement omitted.]

IN DISTRICT COURT OF HARRIS COUNTY

[Title omitted]

BILL OF EXCEPTION AND ORDER SETTLING SAME—Filed Mar. 17, 1923

Be it remembered that upon trial of the above styled and numbered cause after the parties had announced ready for trial, a jury had been selected, all of the evidence had been heard and the witnesses discharged, plaintiff requested permission to file a trial amendment in order that she might intervene and appear as a party plaintiff in the capacity of administratrix of the estate of her deceased husband, on account of whose death the action was originally brought. [fol. 49] The court heard argument from the attorneys representing the respective parties and thereupon ruled in favor of the plaintiff and granted the permission to file the trial amendment and the same was filed over the objections and exceptions of the defendant James C. Davis, Federal Agent. The grounds for objections and exceptions as made and presented in open court, were, in substance, as follows:

It conclusively appears, as a matter of law, from the proceedings previously filed in the case and from the docket entries made by the court, that James C. Davis, Federal Agent, was not made a party by any amendment pleading until Monday, November 27, 1922, and that there was no authority for the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads, who had been originally sued, until the month

of May, 1922, at which time, pursuant to a motion filed in behalf of the plaintiff, Mrs. Mary Preston, individually, and not as administrartix, the court entered an order authorizing the substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General, in the suit as it was at that time pending; but, inasmuch as Mrs. Mary Preston was not then the appointed and qualified administratrix of the estate of W. P. Preston, deceased, and was not suing in that capacity, requesting the court for permission to substitute James C. Davis as Federal Agent, that it followed, as a matter of law, that the trial amendment, presenting an entirely new cause of action in that it was asserted by an entirely new party against an entirely new defendant, and that, being a new cause of action brought against the Federal Agent, it was initiated too late, in view of Section 206 (a) of the Transportation Act of 1920, which requires that any such action must necessarily be brought not later than two years from the date of the passage of said statute.

[fol. 50] Having excepted to the action of the court in allowing the trial amendment, and having indicated the grounds of exception as above outlined, appellant now presents this as its Bill of Exceptions No. 1, with the request that the same be examined, approved and ordered filed as a part of the record in this cause, which is accordingly so done.

Harvey, Judge Presiding.

O. K. McDonald & Wayman, Cole & Cole.
O. K. A. S. L. M.

[File endorsement omitted.]

Bill of costs omitted in printing.

[fols. 51 & 52] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] IN DISTRICT COURT OF HARRIS COUNTY

No. 87829

MRS. MARY PRESTON

vs.

WALKER D. HINES

STATEMENT NOF FACTS—Filed Mar. 24, 1923; in Court of Civil Appeals Mar. 24, 1923; in Supreme Court Nov. 5, 1924

Be it remembered that on the 27th day of November, A. D. 1922, the same being one of the regular days of the November 1922 term of the 80th Judicial District Court of Harris County, Texas, came on to be heard the above entitled and numbered cause, whereupon the following facts were admitted in evidence by the Court:

M. A. MOORE, a witness for plaintiff, testified by deposition as follows:

My name is M. A. Moore; I live at 818 Caroline Street, Houston, Texas. I am an employee of the Houston Belt & Terminal Company; I have been with this company as an employee a little over three years, the employment has been continuous, I have been with them all the time. I do switching, I am the engine foreman; that comes under the classification of switching, just a promotion from the switch engine.

I was engine foreman on the night of September 14th, 1919, the night Preston was killed. I knew W. P. Preston. He was working with me at the time of his death, for the Houston Belt & Terminal Company, I presume, that is the one I was with. I could not tell you exactly how long Preston had been working for the company, but I presume he had been working for them four or five months maybe. I knew Preston quite well, I met him the first day he came over; I had known him about four or five months, that is how long he worked in the Belt. I could not tell you how [fol. 54] much experience he had had as a switchman. If you say he had six months here—whatever length of time

here, he had that experience. He had had experience when he came, I could not tell you how much experience. I would regard him as an experienced switchman when he came here at that time.

I was engine foreman on the night he was killed, I was a member of the crew at the time he was killed. There were three helpers and the foreman in the crew; the helpers were switchmen. There was the long field man, the short field man and the pin puller; I was the engine man. The long field man is the man that tends to the hind end of the train, whatever way we are going. If we are gong out he protects the hind end of the train. The short field man stays up and high balls and flags ahead of the engine; the long field man protects the hind end. The pin puller is the man who amputates the cars, I mean he amputates one from the other, he does the coupling too, he is the man that has all the work; he does not do coupling but he does all the uncoupling. The engine man dictates the work; he does coupling too. He is the foreman of the switching crew. Then of course the engine we are working with has an engineer and fireman. That constitutes a full crew.

I remember the night on which Preston was killed. It was on the last trip, about ten or ten fifteen, something like that. It was a rainy and windy night. You know how it was on the night of the 15th. When they ask me regarding that night—I have been in three storms and I could not regard it as a storm. At the immediate time Preston was killed it was drizzling I think, wind and rain mixed up. The wind was blowing I guess about 35 miles an hour. Preston had a raincoat on, it was a long rain coat, I don't know what brand it was. It struck down below the knees, between the knees and ankles.

[fol. 55] We picked up these cars at the depot that we were carrying at the time he was killed; that was the Union station depot; that is, the distance from McKinney to Crawford, that would be about a mile—about three-fourths of a mile from McKinney to Crawford; I don't know how you would measure that; it was about three-quarters of a mile. The cars belonged to the Santa Fe; it was #5 equipment. No. 5 comes from Chicago or just outside; they were cars brought in by No. 5, Santa Fe, which was a passenger; they tied No. 5 up that night, would not let it go to Gal-

veston; we took the cars out to re-ice and water, we took them out to the coach yard to re-ice and water. The coaches were them large new style, new class, 900 style I think it was. I do not remember the number of the car but it seems like 974 was the number, something like that. There were three coaches. I think we carried six in all, two baggage, smoker, chair—two chairs; I don't remember, I am pretty sure we carried five or six in all, I don't know which. We were directed to take them out to be re-iced and watered and to put them on the short rip. The track that we were to put them on ends down at Sampson Street, just about half way between Sampson and McKinney, that next street to McKinney. The short rip track we were going to put them on left the main track that we brought them from the Union Station on between Milby and Leeland, I don't know the name of the street, the cross over switch is there; we then came on the switch at that point. The coaches were to be stationed this side of McKinney street crossing when we stored them; by "this side" I mean the South side of McKinney street crossing. That track extends over the crossing at McKinney Street. They would stop at this end of McKinney Street going out; in backing them we reach McKinney and then stop. That is where we intended to put them and where we did put them.

[fol. 56] Preston was the long field man that night, Cloud was the short field man, and McDaniels was the pin puller. Generally the long field man gets off when we reach McKinney Avenue; the long field man always gets off to flag the crossing, that is, when we bring the cars back, and also to protect the crossing; we generally always slow up and let him off. It was generally always understood to get off, I never directed him to get off there. It was customary for him to get off there; I told him what we were going to do before we went down and it would be understood that he was to get off, and I slowed up for him to get off.

As we reached McKinney Street there was the smoker and then the chair car; Preston and I were in the chair car together, that was next to the last chair car. He left me before he got to McKinney to get off I presume. He went South out of the coach, toward the front end. I turned around and went back. I started out and a fellow

I saw when I got on by the name of Wallace, I had not saw for quite awhile; he was talking to Wallace; I got up to get off but this fellow Wallace said something and I turned around and come back in the coach and sat on the arm of the chair; Preston passed me going out, he was going South just before we got to McKinney Avenue. We slowed up just a little way from where they found him. I stayed on until after we had crossed Milby Street. Just after we passed Sampson Street Preston started to the front to get off the front of the coach; I believe "Sampson" is the name of the street that the round house is on; that is about a block you know. From the time he started until we reached McKinney Avenue he would have had time to have gotten there so as to be on the landing at McKinney Avenue to get off; he would have had time to get off at McKinney. He would not have much time to wait before reaching McKinney Avenue; we slowed down to let him off; he was gone to the front when we began to slow [fol. 57] down.

I don't know which pattern the steps on that coach were, they were regular steps on a car vestibule, just like all the new coaches have got. I never examined to see whether they were drop steps as some have them when they let passengers off; I never did notice that car. As far as I know the coach step was in good order. If there had been any bad orders they would have said something and I would have had to cut that car out for a bad order. At the time we reached McKinney Avenue the coach could not have been going over eight or ten miles an hour; it was going right slow; we always make that stop; of course a train after applying the air, a train that has got air brakes has got to take hold before released into speed again. They use air to slow a train down.

When we got off this train of cars was on the main line, outbound main line track. As we came to McKinney, after we had crossed McKinney Avenue going South, the next track to the left as we went out was the inbound main track. Preston got off on the left side as we went out.

The distance between the outbound main track and the inbound main track is about six feet at the McKinney Street crossing. The inbound, outbound, long rip, short rip and the run around tracks crossed McKinney Avenue. There

were the coach track and one, two, three, four and—tracks that came up to McKinney and stopped. The coach yard is on the right of the main line track. On the left is the inbound main, long rip, short rip and the runround. That crosses McKinney, and then they laid there 27 track, the Magnolia Petroleum Company track, but I don't know if it crosses McKinn*dy*; it leads off, that track, down round the Magnolia Petroleum plant. This place at McKinney Avenue is a part of the switch yards, that is where the coach shop is where they bring coaches to and from. Then there at McKinney Avenue, on both sides of the inbound [fol. 58] and outbound main line was a lot of switches and tracks that were used in switching cars. They do not have them now. They used it originally except the old rip track, but since Government control they have made a passenger yard out of it on the left side; long, short and run round, but since private owners have it back they use long rip for the rip track and fill short rip with rips.

Q. Was crews of switchmen in and out of those tracks there at McKinney Avenue frequently or not about that time?

A. Well, I have been down. I took a couple of passenger trains in and brought back a couple of trains, had just went in that night.

That system of tracks is frequently used for storing passenger trains; there is not much switching there, only when they cut one out or set one back in. I would say switching crews were frequently at work at that McKinney Avenue place.

I am asked to describe the condition of the ground at McKinney, beginning at McKinney Avenue between the main line out and main line in, that is the surface of the ground, how it was, whether dirt, shell or what it was. It has been coated with mud shell. You have been to Galveston, you know what that is. The McKinney Avenue street crossing is on a level with the surface of the ground as between those two tracks right where the ground comes up to the street crossing. McKinney Street is not covered with shell; the point up to McKinney Street is covered with mud shell. McKinney Street is covered with planks, it is floored with regular crossing woods and planks.

As to when I first learned that Preston had been killed—before leaving the depot I told Preston that Coach No. 7 was on the hind end and the short rip fellow would have [fol. 59] to shove it over the crossing and we could couple it and shove it over the crossing; well, I got off and I don't know why I did not see Preston get off. I got off 25 feet from where we found Preston. When I got off I changed my lamp into my left hand and walked down the line to the switch, turned around and changed my lantern into my right hand, I walked back to where they found him and lined up and kept on telling them to come on; I walked ahead of the two cars, backed up and tied onto Car 7 myself, and Preston wasn't there; well I stopped and just about then the car knocker was walking around with a hat in his hand and says to me: "Isn't that that fellow's hat?" As soon as I saw it I said, "That's Preston's hat, where did you get it?" He said he found it on the main line. I figured then there was something wrong and commenced to look underneath the trucks all the way up; when I got up to the first baggage car a fellow says to me, "Got all your crew"; and I said, "No, I'm looking for Preston." He says, "There is a man over there dead on the crossing." That was the crossing just about ten feet of Milby Street, ten feet south of Milby Street.

When Preston got off the coach I was talking to Mr. Wallace, it was between Milby and the switch. I got off at the switch, not the first switch, over by the other, got off at the switch on inbound main; that is south of Milby just a little way from where Preston was lying. I walked up to throw it and turned around and walked back. That string of cars was pushed in on that street to be stored. I came across, I went from the main line to the short rip after I got off the coach and lined up. The inbound main leads off the main line to short rip track. I then went down and kept ahead of the train, giving the signal to go ahead on the short rip. That is the track we were going to store the cars on. When the car knocker came up, I went from there over to the coach yard. I was just cou- [fol. 60] pling cars on short rip, No. 7, then south from McKinney, Milby, two blocks. I was then at McKinney Street crossing. I saw him pick up the hat; he brought it from round the coaches, from the main line. When he came to

me he was coming towards the east. He had picked the hat up on the main line, he said, on the outbound one. He did not say how far from McKinney Street crossing he picked the hat up. I was right at McKinney Avenue; I coupled the coach and walked around the coach to look at them shove over, and he walked up, right up with the hat and says "Isn't that that man's hat?" I don't know which side of the outbound main he picked the hat up, I never asked him where he picked it up.

I did not find nothing that belonged to Preston; I saw his lantern, they had it over on the coach, I don't know who picked it up; they did not tell me where they picked that up, they said that was Preston's lantern. I then made an examination of the ground there at the McKinney Street crossing, right up to the crossing between the two main line tracks. About here's the crossing—say about here (indicating) about two feet, a little further then, say two and a half feet,—there was a heel print. As to whether it was heavy, of course, it was raining, the ground was soft and the heel sunk in the ground; it sunk in the ground about his heel, it looked to be fresh. Just about here the man got off (indicating). I found the print of the heel. There were some rails between those two tracks, they were steel rails. That foot print was fresh, it looked like a fresh heel print. That was about two feet from the end of a rail. There was one rail there. Rails were all the way down. There was only one there that I seen; I guess that was steel, they are supposed to be putting in 90 lb. steel. This heel print was about two and a half feet from the rail, from the end of the rail. The rail was lying the way the train was going. There were rails all the way clean [fol. 61] out to the yard laid along in position to be joined up. There were not two rails, I just saw one. Some places way down there were two just laid to be—stretched out.

The long field man ordinarily got off on McKinney Street to do work expected of him. As to whether he got off right at the street or just after crossing, I don't know where another man would get off, where one would get off at McKinney Street crossing, another might get off on the other side; when I work long field I don't ask the foreman where to get off. Preston may have got off on the South side or North side, I could not swear to where Preston got

off. I found a heel print there but I could not swear it was Preston's. From looking at it it looked like it had just been made. The rain falling that night would not have wiped out an impression that deep down even though it had been made sometime before, water going into the print you know. I don't know that I would expect a man to get off either at the place where I found this foot print or somewhere close thereto, to do the work Preston was supposed to do; when I work an engine they usually get off at McKinney but I never told them to do it; I have seen them get off there frequently and I have got off there myself; it was a frequent thing for a man to get off at this particular place, everybody gets off there that generally works long field; I never tell one to get off there; I never told him to get off that night, but when a man would leave the coach before getting to McKinney Street crossing, I thought he was getting off; I did not tell him to get off there, he got off there all day.

The foot print was parallel the rail but it was about that far from the rail (indicating). The rail lying loose on the ground was more than one-fourth of a foot from the step of the coach that Preston got off. The loose rail was I [fol. 62] guess about a foot or a foot and a quarter from the steps. As to how far a man in alighting from a coach steps put his foot as he alights, you have different rules. Every man does not light on the same foot; one will light on the right and some on the left, I can tell you how I light. Some light closer and some further, I could not tell you about that, it is just like any other business.

I walked all the way up the main line to where we found the body to look for blood or other evidence, to locate where Preston might have first fallen or gotten under the train. Near McKinney, as evidence indicating that he had been caught there at the McKinney Street crossing, I saw little pieces of his underclothes and jumper. That was down about—probably a quarter of a block away from McKinney Street. There is 300 feet to a block. About 150 feet I guess from McKinney Street were the first signs I saw that he had been caught. I saw little pieces of his undershirt and jumpers, a blue shirt it was. I never saw any blood. One blood stain a fellow showed me; that was just a little ways from where I saw this piece of cloth, half

a car length towards Milby. I don't know where the lantern and hat were found, they were found on the main line somewhere. From there on to where the body was picked up I did not find anything. I will tell you I was the last one to see him. The body had not been moved when I saw him. Between the point where I first found the pieces of jumper and undershirt I never found anything. I never looked at the coach on which he was caught or struck, but I believe some of the men did. I walked on down from where we found the jumper and undershirt to where the body was found, and I found nothing but pieces of shirt. I never found anything at the Milby Street crossing, I never saw anything. I never found anything after finding the undershirt until I found his body.

[fol. 63] That rail that abutted McKinney crossing, loose rail, had been there quite awhile, I don't know how long, I would guess it had been there three weeks or a month; I don't know exactly how long but it had been there quite awhile. They were just strung along, some hitched up and some loose; some hitched up awaiting an opportunity to slap out one and put these in. They had been there quite awhile, three weeks, a month, probably more. It must have been probably a week afterwards they took it away from there, that is, a week or week and a half after Preston's death. I could not tell you whether they moved them out putting in track; I came out on the eleven o'clock cab and I noticed the rail gone. That was about a week or a week and a half, or probably two weeks after that. I had been out there frequently after that, I had been out there all the time, I had been out there every day.

(The witness testified on redirect examination by deposition as follows:)

I think this man Wallace that was on there with me lives in Temple. I can't place his first name. If you have to get him, it is Engineer Wallace. He works for the Santa Fe.

I did not say the truck part of the train caught Preston on which he was hanging at the time he was killed. I never saw that. I found this jumper etc. over towards the right side of the train going out. It was on the left side going out laying over towards the right rail, a little from the

middle. His body was picked up from the right side of the track, I mean inside of the track, close to the right rail; say here is the track, here is where his body was found (indicating); it was in between the rails, over towards the right. I don't know how he was drug under; he simply must have been drug. I only saw him get out of the coach; some used one side to get off and some another, you can't say which side he got off; a left-handed man would go [fol. 64] to the left, a right-handed man would go to the right.

I did not examine the body, I saw it. I went up to the undertakers and the ankle was broken on one foot; I think this foot was cut, the right foot, and the left ankle was broken I believe. He was all bruised. I do not think he was cut anywhere. I never saw no limbs cut off. The undertaker come out and took him off right away; I just went up there and looked at him.

From the point where I found the heel print to the end of the rail was over a good step for a man getting off a train going as fast as that. If anything were placed at that point where the rail was placed and a man did not know it was there, or had forgotten it, and got off in the night time, it would be liable to trip him.

As to whether it is the custom of the switch yards to keep free from all obstacles to keep their men from tripping, will say that that is not a yard, it is the main line. Where we do switch trains, where we get on and off, of course it is regarded by switchmen as unsafe to leave anything like rails and other obstacles around; we don't want nothing in our way. Certainly it would trip a man if he got off a train and touched a rail, it would trip and throw him. As to whether I think that is the reason that Preston met his death in stepping off, will say I could not think nothing because I have two ways to think. I could not answer whether I think the most probable explanation of his death is that he stepped off, hit the rail, it tripped him and threw him under the train. He never worked all day long with a raincoat on, he had on a raincoat that trip. He could have stepped off and hit the rail and tripped; he could have got his raincoat caught in the door, got his clothes caught or anything like that; I did not know how it was.

[fol. 65] The undertaker, Leo Weadock Company, told me this ankle was broken.

(On redirect examination the witness testified by deposition as follows:)

When I got on this coach to take them out there I did not open any of them to go in, I got on the hind end of the car, and Preston got on the car ahead of me. I walked through. I got off the left side, I got off because the switch is on that side, the left side was open, I got off that side.

(In reply to defendant:) The other one may have been open, I never noticed whether it was or not.

J. S. Cloud, a witness for plaintiff, testified by deposition on direct examination as follows:

My initials are J. S. 604 Travis is my home address; 915 Milvid is my mail address; my telephone number is Taylor 2035. I am working for the H. B. & T. I have been working for them going on five years. I don't know the exact date of my application. I work in the capacity of switchman. As to whether I was working in the same capacity the night of September 14, 1919, the night W. B. Preston was killed, I don't remember the date, whether that date is correct or not; it was the night of the Corpus Christi storm, Sunday night, wasn't it? I was working what you call short field, next to the engine, on the same crew Preston was working on. He was working long field. I was working next to the engine, he was on the rear end. I remember of course the occurrence of W. B. Preston being killed.

I would not swear to exactly how many coaches in the train that were being carried from the Union Station down to this storage track, because I don't remember, but as near [fol. 66] as I remember we had the whole of Santa Fe No. 5 to put away, because on account of the storm it was not going on to Galveston; I don't know how many cars she had at that time, but there were possibly five or six cars. The rear car was a chair car, I know that.

I could not say exactly what time of night it was that he was killed but somewhere in the neighborhood—after

ten o'clock, ten or ten thirty, as near as I remember. When they approached McKinney Street crossing McDaniels and I was riding in the smoker, about three or four cars from the rear; the train had six cars, that was about the third car from the front; it was not the next car from the one Preston was in. As near as I remember, from what I remember they afterwards told me, Preston was riding in the rear car; of course that is his place to ride and look out for the rear of the train in case they stop or anything. The last time I saw him alive was when he got on at the depot. I could not say how much experience the man had had; according to the way he worked he was an old hand, an old timer; he not only had experience, he was a good switchman. I don't know what job he was working on—whether extra or what; I worked off and on with him five or six months. I don't remember whether he was working extra at the time or not; if an old man leaves or is absent for ten days, of course the extra man catches his job for ten days straight until the man reports,—ten days or more—I don't know whether or not he was working extra. I saw him alive at the Union Station when he got on at the station the last time.

The long field man's duty is to get off at McKinney Avenue and protect the crossing when they shove in. He has to watch to see that they don't back over the posts and knock them down; has to watch traffic to see that nobody gets hit with the cars, in other words, to see that the train [fol. 67] backing in does not run over nobody. He is supposed to get off to protect the rear end. The long field man usually gets off right there at McKinney Avenue, right at the crossing. I don't know where he got off the train the night he was killed; we were riding ahead; the fact of the case is we did not know he was killed until we found him. I was working short field and lined up the switch. There was a freight crew on the track going in, with an engine ahead of the cars and the flicker of the oil burner in the headlight, the oil burner beneath; there was a man riding the foot board by the name of Thompson, on the other crew, and the engine stopped, I don't know what it stopped for, it stopped quick as it could and this man run back to where I was at the switch and asked me if we had all of our crew and I told him I guess we had, and he asked wasn't it

Preston working long field; he asked if I knew where Preston was, and he said this must be him, or looks like him, there is a dead man on the track. That was when I first learned Preston was killed. This fellow Thompson was talking to me, he was the switchman on the other crew. That was just south of Milby Street about fifteen or twenty feet. At the time the man called my attention to it I was clear over on the main line, on the left side going out, away from town, on the right of the south bound main line, that is, the right looking South; he was in the middle of the track.

I did not help take the body out. Whenever a man is killed we do not touch him until the coroner comes. We just protected him and waited for the coroner. He was not under the train, he was in the midde of the track. There were no indications on the train as to which side he had been dragged on; we could tell nothing. At the Milby Street crossing there was indications on the rear trucks of the chair car beneath the rear trucks, that was the only thing; it was the last car; seems like it was general over the truck, over the brake rigging, as far as I could see. At the [fol. 68] Milby Street crossing, if I am not mistaken there were evidences there as to where he had struck the crossing, that is which side. I never found any of the equipment, any clothes, hat or lantern or anything like that, but from what I understand from the man who did find his hat and lamp, it was on the left hand side going out as if he got off on the left side. That was the proper side really to get off; in fact the only place he could have got off with safety at that time was McKinney avenue, and when it is wet and slippery that asphalt is not safe, a man is liable to slip and fall; if he could have hit the shell on the left side would have been safest, that is in order to strike a surface of shell. I could not see any indication at the McKinney Street crossing as to which side he was being dragged on in the way blood or otherwise; there was nothing on the train on the left or right side, only what I have stated.

I viewed the corpse at the undertaker's and as near as I remember, the right arm was cut off, left leg cut off, he was twisted all out of shape, I suppose bones broken all over, I suppose he was killed instantly, his face was cut up. It seems to me the arm and left leg were cut off, either

left leg cut off and right arm broken or right arm cut off and left leg broken, I don't remember which; I just taken two or three looks and did not look at him any further, because a man working where I am keeps his eyes off of anything like that, because it is liable to happen to him.

I was with the rest of them when they went there and examined for any signs at the McKinney Street crossing; we all walked there to see which side he got off and looked at the foot print; I could not swear to it from what I saw but my opinion—what I mean is nobody could, at least I could not, swear to what side he got off. We found what looked like a foot print in the shell there but of course it [fol. 69] was raining pretty hard and we could not tell whether it was an old or new foot print. Seems like it was a heel print as near as I could discern. I would not venture to say how far that was from the end of the loose rails between the two main line tracks, but it seems about a step or step and a half, possibly two; I don't know exactly what distance it was. As near as I can remember, the end of the loose rail from the McKinney Street crossing was possibly between eight and ten feet, something like that; a man can't swear without measuring. The loose rails were scattered out there to be re-laid. I suppose there must have been two rails, at least it looked like two rails, laid all along each track to be re-laid. Beginning at McKinney Street crossing, I don't know exactly how far they extended south, because we do not work any further south than that cut-off. They were laid down as far as Milby Street. I could not swear how close in between the two main lines the two rails were together at McKinney Avenue; they were something like a few inches, possibly a foot, ten or twelve inches apart as near as I can remember.

It seems to me like the man found his lantern on that side of the inbound line, that is, clear of the two tracks, I could not say exactly how far from the McKinney Street crossing; they found his lamp just opposite the crossing. I think, according to what I heard, his hat was found somewhere in the neighborhood of the main line, on the left hand side. We did not find any evidence along there close to McKinney Street crossing showing he had been caught there by the train, nothing but his hat and lamp. According to my inspection next day, I found bits of clothing, pieces of cloth that matched his jumper, down about mid-

way between McKinney Avenue and Milby Street or maybe a little further. We did not see any clothing on the train; I looked on the train. He had on a slicker, that was torn all to pieces. I could not tell whether it was torn any one [fol. 70] place more than another. His clothing was all torn off of him. He had been dragged somewhere from McKinney or Milby, according to the best of my knowledge, from the looks of the body.

If I was doing long field work, that is where I would get off, where that foot print was. I have seen them get off there.

(The witness testified on redirect examination by deposition as follows:)

As to whether I got on *on* the left hand side when I left the station with those coaches, it is just like I said, if a train backed in on No. 6, the regular track, we got on there, if we was only handling one train, but sometimes we pulled more or doubled over another track and got another one; in that case we may get on the reverse side, whichever side of the platform it was on. As near as I remember, on that particular night we got on from the left hand side; Preston did too. The vestibule would be open on that side too. My impression is he got off. That is the side on which I looked for tracks that night. We looked all around there, as far as that is concerned. We searched everywhere for marks. Nobody was a witness, an eye-witness, we could not say what was possible; that night we just discussed what could have happened. We said it could have happened by him stepping off and hitting those rails; there are a half dozen ways it could have happened. We did discuss that it might have happened that way, at least several of us made the remark that it could have happened that way, he could have stepped off and hit the rail and fell, or could have stepped off and got his clothing caught or could have steppeed off and slipped and gone under the wheels. There are a half dozen ways it could have happened; you don't know how many ways a man can be hurt by a railroad until you get hurt about fifteen times. It was just like I say, we did discuss that theory; in other words, we could not swear to nothing because we did not see him. [fol. 71] The fact of the case is nobody could swear what side he got off, as far as that is concerned, because we don't

know. It was dark and rainy. The left side is where it is customary for a man to get off. They told me his lantern was found on the left hand side across the inbound main line track across from McKinney Street crossing. That is about the only thing on which we fastened the fact onto, at least settled on the theory that he did get off there, was his hat and lantern there.

A. H. McDaniels, a witness for plaintiff, testified by deposition on direct examination as follows:

My name is A. H. McDaniels. I get my mail at 917 Pinckney Street.

I was a member of the switching crew the night on which W. B, Preston was killed. I was following the engine, There are four men in the crew, foreman, one man follows the engine, short field and long field man, and I followed the engine. I don't know that I exactly remember what time of night Preston was killed, it was along somewheres about, as well as I remember, about nine o'clock. I believe there were five cars in the train on which he was riding at the time he was killed; there were three coaches and two baggage cars,—three passengers and two baggage cars. They had been picked up at the Union Station. We were going to put them down on the rip track. Preston was long field man. When we got to McKinney Street crossing it was his duty to protect the cars and the track in shoving the train through. They generally get off there at McKinney Avenue and see that they don't catch nobody on the crossing. He got on what we call the North side, I suppose, of the train when we left the Union Station; that was the left side going out. The vestibule was open where [fol. 72] we got on. I never noticed whether all the vestibules were open, I got on at the head end and walked through. Preston must have got off at the McKinney Street crossing on the left hand side next to the rip side, becauses he was going to shove off on the rip track. That would have been the usual and customary place to get off. I know he got on there at the Union Station, on that side. I don't know which way they went in. I got on the first coach, second class car, I don't know whether he got on the hind end or next to the hind end. That is the side they

let passengers out, the platform side. Those vestibules would naturally be open, the others would be closed. In going out I was next to the rear coach. Preston was in the same coach with me. I first learned he had been killed when we crossed over to shove into the rip track. The foreman who rode the hind end did not see anyone there and thought he was ahead; we passed the signal and when the engineer shoved in Moore come and says "Where is Preston"? and I told him the last time I seen him we went out to get off at McKinney; we then begun to look for him, one of the car men in the yard, coach yard, picked up his hat and asked if that wasn't his hat. We had already backed down to McKinney. The watchman at the switch yard brought the hat. I did not see him pick it up; he brought it to us over across the main line; he came from the main line clear across the track, he saw us over on the rip track. I never noticed him come from the main line track until he walked right up with the hat. We had not found the body then. Somebody found the lantern then, I believe Moore found it; I saw him pick it up; it was on the left hand side plum across the inbound main line, that is, over towards the rip track, I judge it would be about 14 feet over there from the main line, and about ten or fifteen feet I suppose from the McKinney Street crossing. I knew that was Preston's lantern. I began to look under the cars on the rip track. I did not find anything, but after- [fol. 73] wards I think some of the crew found pieces of clothes and flesh hanging to the rear car. I never went down there to the body; I went only down to where the engine was. I did not go beyond the middle of the street that night until the body was picked up. I examined along the tracks for signs, I walked from where McKinney Avenue was to where the engine was; one of his shoes I found along the main line about midway between McKinney and Milby. I did not find any marks at all showing evidence that he had or had not been dragged. I saw a foot print with the others there that night close to the McKinney Street crossing on the left hand side of the track, I judge possibly three or four feet from the McKinney Street crossing. There were two rails between the two tracks that night, they were between the two main line tracks. I don't know how far it would be from the line of the coach to where the rails were, but about the middle of the track,

not over 18" of the outside. The end of the rail next to McKinney Avenue was I suppose about four feet from the McKinney Avenue crossing. We found what looked like, somewhat like a heel print there in the shell; it seemed to be fresh. I don't know but it was about eighteen or twenty inches I guess, something like, from the end of those loose rails.

There was no discussion between me and the other members of the crew and those that were present that night in reference to this track and his stepping on those rails, might have stepped on those rails; there was no discussion that I remember. This foot print in the shell was in the usual and customary place for long field men to get off the train going down there; it was just about the right place to get off on a paved street there. On a night when it is raining you are more likely to get off on shell than you would be on boards or cement, it would be safer. I don't know how [fol. 74] long those rails had been there in that place, but they had been there quite a while.

I did not examine the body; I did not see it at the morgue or examine it that night. The next day when I went down there I looked there at Milby Street crossing for signs where the body had been dragged. The only thing I found was pieces of clothes and little pieces of flesh on the crossing boards, at Milby; they were in the middle of the track on the north side of Milby. I found pieces of flesh etc. there. It was in the middle of the track of the outbound main line. It tended to show that the body caught there on the crossing and probably mangled more, or worse, there, because if he was caught underneath, the brake rigging would just about clear him until he hit the crossing; boards struck him, I guess, and tore him loose.

I never saw the coaches. I did not examine the coaches that night for evidences of blood or anything. I never went down to the hind end. Some of the boys went back to the hind end and found clothes—pieces of clothes on the brake rigging. I personally did not go and I did not see the body afterwards.

(On redirect examination by deposition the witness testified as follows:)

I had on a slicker, rain coat, that night. The boys, the switchmen working there, usually worked in raincoats and

slickers; that was customary. Preston usually wore one on a rainy night too. I had on a slicker.

[fol. 75] Mrs. Mary Preston, plaintiff, testified in her own behalf as follows:

My name is Mrs. Mary Preston. I live in New Orleans, Louisiana. I have lived there a little over three years. I was the wife of W. P. Preston who was killed in an accident here some three years ago; he was a switchman. I was married to him on December 5th, 1915; we had been married about four years. We got married at Brownwood, Texas.

My husband was twenty-nine years old at the time of his death. I had known him about a year and a half before I married him. My husband's health was very good while I knew him. He was a large man, very robust; he usually weighed 185 pounds. The salary my husband got as switchman varied from $150.00 to $175.00; he did not always make the same. I am now twenty-three years of age. I am cashier in a restaurant. I have been working ever since my husband's death. My husband and I had no children and my husband left no child or children. Neither his father or mother were alive at the time of his death.

Cross-examination:

I was married in Brownwood. My husband was braking for the Santa Fe out of Brownwood on a local at the time I married him. I don't remember exactly how long he remained in the service of the Santa Fe but it was about a year and a half or two years after we married; from there we went North to Emporia, Kansas, and he worked on the Santa Fe there, on another branch of the A., T. & S. F. From there we came to Shreveport. Shreveport was the last job of railroading he held before he came to Houston. I do not remember his working for the "Sap"; just where is that railroad? Here? I don't remember him working for the San Antonio & Aransas Pass Railway.

My husband and I lived together at Brownwood, then at Lometa, Texas. There they had him at work braking on a [fol. 76] work train. The next place we lived was Temple, where he was still working for the Santa Fe. I cannot

remember exactly what the next place was, it has been so far back, so long ago, I believe he went north then, I don't remember exactly. The last road he worked for at Shreveport was the T. P., but he worked for another road over there.

My husband was not a drinking man, he did not drink at all while I was around him; I never did see it; I did not know about his being discharged for drinking; I never knew anything about that. I had no trouble with him personally and in our family affairs on account of his drinking. I left him and went to New Orleans because he was changing businesses; after he had left Shreveport he did not know what he was going to do, he thought he would go down to New Orleans with the T. P. I never left Shreveport with the intention of not living any more with my husband; I never had any such intentions; I took a position because he was not employed at the time. I tell the jury that there was positively no difficulty between me and my husband at all. I did not leave him at Shreveport, we left about the same time, he left about two days before I did. The times when my husband was out of work varied. He did not stay out of work more than a month or so at a time, no longer than he could get on another road. I don't remember whether or not he was discharged when he left the Santa Fe; I don't remember either whether or not he was discharged when he left the T. P. I was working about four or five months before my husband's death, but not at the same place I am now; I was working at the Elks Club.

I heard from my husband about a week or two before he was killed. I haven't the letters. I never kept any of them, in fact I have nothing that belonged to him, I did not want to keep it. I learned about his death from a friend, a lady friend in Shreveport by the name of Mrs. Dunmeyer. I was [fol. 77] in New Orleans when she told me about it. She came down there to visit her daughter and told me about it. That was possibly two or three weeks after the death of my husband.

My husband had one brother.

Redirect examination:

I stated I ascertained about my husband's death about a week or two after it occurred. I was not notified before that because I had not been writing home and did not let

my people know just where I was because they intended locating here and I had not written them; my people did not know where to find me because I did not tell them where we were going to live, we had not decided. As soon as I found it out I came to Texas immediately. I went to Brownwood, my old home, where he was buried, and I went to his grave.

Subject to showing the life expectancy of the deceased, which will be shown later, Plaintiff rested.

Plaintiff rests.

M. A. Moore, on behalf of defendant, testified in person as follows:

My name is M. A. Moore—Michael A. Moore. I now live at 3617 Avenue H, Galveston, Texas. At present I am switchman for the Gulf, Colorado & Santa Fe Railroad.

I knew one W. P. Preston in his life time. I was at one time in the employment of the Houston, Belt & Terminal Railroad, under the Federal administration.

On the night of September 14, 1919, I was working for the Houston Belt & Terminal as engine foreman. Mr. Preston worked with me from 3:00 to 11:00 that night, that is, [fol. 78] from 3:00 in the afternoon to 11:00 at night. On this particular occasion when Mr. Preston was found dead we were taking Santa Fe No. 5, it is a Chicago train that comes through to Galveston, and there was a storm brewing, you know, that night, which was the Corpus Christi storm, and we got orders to take No. 5—Santa Fe No. 5— to the long rip and place it there for re-icing and cleaning to go out on No. 6 in the morning; in other words, this was a south bound train from Chicago to Galveston and it had gotten as far as Houston on the way and this storm was brewing and they gave orders to hold it up here until the next morning, and during the time it was laying over here the cars in that train were to be placed on a particular track of the coach yard of the Houston Belt & Terminal Railroad. It was my crew that was undertaking to carry the empty cars from the Union Station after the passengers had gotten off, out to where they were going to leave these cars until the next morning. In going from the Union

Station with this string of cars the engine was pulling the cars, pulling just like the road engine would in handling it.

On the way out to where these cars were going to be placed I was riding second car behind the baggage, that is, the fourth car from the engine; I think she had a first class car and combination and a smoker; I think that is what she had, five cars in all, and I was riding on next to the last car, which was a chair car. Mr. Preston was riding with me in that car. The last time I saw Preston before he died was at the door of this car we were riding on. As we sat in this chair car we were sitting on the arms of the seat, which would make us face West I think,—I don't know the directions. When Preston got up to go he went towards the engine, that would be in a sense South. When he got up to go I went ahead of him; Preston got out first; we was talking to a friend, you see, that came down on that car that night, [fol. 79] an engineer; he came down on that train, he was one of the crew and he was in the car with me and we were talking to him and we both got up and walked out towards the door, I was in the lead and this engineer said something to me and withdrew my attention and I turned around and went back and Preston went on out; the door of the coach was closed after him; I did not see him any more after that coach door was closed, the next time I saw him he was dead; I did not see him get off and I do not know which side he got off. Someone attracted my attention, I say, and that was the reason I turned back, he was telling something interesting.

I guess there are about five or six crossings in going from the Union Station on out to McKinney, and there is also the S. A. & A. P. crossing, the tower, then we have the Sampson Street crossing, which is the next street from McKinney towards the Union Station. I don't know what the next street beyond McKinney, going out that direction, is; there is a little street in there, in between, that I don't know, and then came Milby. I guess Milby must be two blocks—two or three blocks from McKinney.

I say that when Preston went out of that door and closed it, that is the last time I saw him until he was found dead. He was found dead on the south side of the crossing, on that side, closer to that side of the rail,—well I guess it is from here to that lady there (about three feet) from the crossing, and it was on that side of the rail. It was near Milby.

Street. When I say the rail I mean the right rail going out on the out-bound main. There are two main tracks there, one is called the outbound main and the other is called the inbound main. The outbound main is the one I was going out on, and it was the track to the right as I went out. The rail near which he was found was the right hand rail on the outbound.—on the right hand main track or the [fol. 80] outbound, and near Milby Street, which is approximately two blocks from McKinney Avenue.

I did not see him get off and I did not see him fall and I do not know how the accident occurred. He had on a rain coat that night. It was the night of the Corpus Christi blow, I told them that would be our last work, I wouldn't work no more; when we were going out I told them we would put that train in there and put up on account of the storm.

My attention was called to this heel print. On this photograph you hand me I can recognize the McKinney crossing over the Houston Belt & Terminal tracks; it is there; it shows what appears to be the outbound main track, and it shows the inbound main track; the long rip and short rip are right there; the cars that are shown in the picture to the left of the main tracks are situated respectively on the long and short rip tracks, the cars that are situated to the right of the main tracks are on coach track No. 1. You haven't all of the picture here. I cannot tell whether that is the switch shanty, I mean whether that is the flagman's crossing, but that is where the flagman's crossing is supposed to be. I can tell from the other tracks and other things in the vicinity that my identification as already made is a correct one; that is the run-around here; the track here is supposed to be the short rip; I do not see the long rip. There used to be a little blacksmith shop in here somewhere. You see there is three tracks in this rip track, long rip, short rip and the run-around. I see only two in there. (Witness was handed three other pictures). I do not see the run-around in there. You haven't asked me about the run-around, you asked me to identify the place. This track with the curve I would have to call the long rip. That track was there on the occasion of Preston's death; this short rip was there; this inbound main and outbound main were there at the time, and this track over here with the coaches on it was [fol. 81] there at the time. These rails I see between the outbound and inbound tracks were there at that time; that

is the way the rails were lying. I could not locate on that picture the position of the supposed heel mark that was discussed there that night, I could not say where the heel mark was, it was around that place, close to that place right about where that red X is; it was in the vicinity of the red X. (The pictures were removed in order to get the witness' view without the aid of the pictures.) We will suppose for the benefit of the jury that we have the inner rail of the outbound main track, and I was going out on this track with that string of cars, and somewhere over to the left was a string of loose rails to be put in that track, or to be put in one of the tracks. This is the track, this is the left rail of the outbound main, your rails are lying on the left hand side of your outbound main about 18 inches. Here is the end of a rail, we will say for instance,—well now right about here is where I see the foot print. We are supposed to leave the overhang 30 feet from the crossing. Oh! you mean the overhang from the rail—well it is just about that much play, you see. (In reply to plaintiff, witness said the hang over was about 17 or 18 inches from the steps of the car.) The foot print was I assume about 20 inches from that loose rail. I don't know exactly the date they put those rails there, but they were put there quite a while, they had been there quite a while.

I could not tell you how long Preston had been switching, I don't remember when he went to work. He got off there with a rain coat on and the wind was blowing strong. On this occasion I believe the wind was blowing from the northeast. I don't know this town well enough to know directions, you see, I ain't acquainted with the north and south of this town, I get puzzled up all the time as to where I [fol. 82] am at in this town. Of course from what I learned at home the wind was blowing northeast on this occasion. I recollect that night very well; the wind was from the left side of the car as I went out, it was coming up against the left side of that string of cars, I could not tell you what was the estimated velocity. (Witness testified by deposition it was about 35 miles an hour). It was blowing a gale. On that same question I told them I didn't know how fast the wind was blowing, I figure about 30 or 35 miles an hour.

I could not state whether his raincoat was buttoned or unbuttoned when he got out of the coach.

I do not know of my own knowledge where the lantern or hat was found. The hat was presented to me by a car repairer, I don't remember who it was, I just took it, he says to me, "Ain't this one of the switchmen's hats?" I says, "Yes, it is Preston's" and with that—I never even noticed who it was—I ran over to the coach yard.

The other marks or bits of clothing were found some distance to the south of the McKinney crossing, they claimed they were, I did not find them. I had the hat, you know, and when I went up I found one of his gloves which I did not pick up; it was over here to that door out there, further than to the door south of McKinney. The glove is all I found, then they showed me some little pieces of jumper afterwords; a fellow had them and told me, he brought me down the track afterwards and I saw little pieces along there, he showed me little pieces still on the track just about where the gloves was.

Where this heel print was I never saw any other sign or indication of any man's foot print or anything of the kind. There was no indication or sign of a man being dragged in that vicinity, I never saw any.

[fol. 83] If a man was going to couple onto a car which was standing on the long rip track at the far end of it, he would be 110 feet or 100 feet south of McKinney crossing when he made that coupling; the coach I guess was 70 or 80 foot long and of course it takes 30 feet for them to cross it; it might be a little more than 30 foot but that is the ruling, 30 foot, so you can observe everything. In order for him to perform his duty in making the coupling we had to make on this occasion, he would have to be 110 feet from McKinney crossing, that is, south of McKinney crossing; and if he got off at the crossing he would have to walk that 110 feet. There is shell all along there. It is just as good a place to get off down there beside that car as there was right at the crossing.

On that night there was a car standing on the track upon which we were going to place the cars of this train, Santa Fe No. 5. It was GH car No. 7. We were going to shove that car over the crossing to clear the end of the tracks you see on both sides and open McKinney Street crossing, in other words, this car as she stood there was on the south side of McKinney; we were going to put this string of cars of Santa Fe No. 5 south of the crossing and there wasn't

room there and we had to put the other car north of the crossing, and we had to couple into her to do that, and Preston was the man that was going to make the coupling onto that car, and it stood 30 feet from the crossing, was 80 feet long and he would have to be 110 feet from McKinney crossing to make that coupling. If he had gotten off right where he was going to make that coupling he would have been 110 feet practically south of where this heel print was, and it is all shell, the only difference is the wooden crossing on McKinney. If a man gets off on the crossing he wouldn't make a heel print in the shell.

[fol. 84] It has been quite a while, I had been down there but I don't remember whether it was twice, I had been down there with the crew comparatively a short while before this; some of our men got off before that and one of them could have made this heel print getting off on that occasion if he had stepped off on that place. They would get off ordinarily at McKinney Street crossing; this was right at where the watchman walked back and forth; they may step off on the crossing,—walk across there—they have got coach repairers, you know, that go over there; no, they didn't get off of no engine over there and walk over there, they have a track walker that walks the track. No, I am not trying to tell the jury that this was Preston's heel mark, I could not swear it was Preston's heel mark. I don't know how he got caught and carried on that train down to Milby Street.

Cross-examination:

Mr. Preston had switched off and got on my crew that day. I had seen him working around the yards for sometime but he had switched off that day and got onto my crew. I have been a switchman and a railroad man about thirty years. From Mr. Preston's work I would say he was a competent man, could do anything you told him to do pertaining to the work.

The way that those cars back in there at this depot the engine is on the front end and they back in towards the passenger station. With this particular track in the way it backed in, and on the track it backed it, I could not tell you whether or not it is a fact that the doors that are

opened for passengers to get in and out are on the left hand side of that train as you sit on the train facing the engine, because I disremember what track they backed in; I don't remember what track it was on. It is customary for them to open only the doors on the cement side, on the [fol. 85] platform side, but lots of times they have them all open, and the Santa Fe as a rule closed her vestibules forward. We men, me and my switching crew, who boarded this train to take it out there, got into it on the left hand side as we would be in the car facing the engine, looking towards the engine; yes, we got in on the left hand side, I remember that now. When I got out I got out on the left hand side. This track I was on was on the left hand side of the outbound train. We will say left and right and that will get it in my mind. I saw the print of the heel immediately the other side of McKinney Street a few feet from where the planks ended and where the rail began. When I looked at the heel mark I didn't pay any attention to what it was, I don't know whether the heel was across that way or this way; I just seen the hole there just like that and I don't know whether it was that way or this way, because I was excited and I ran to McKinney Street, and when I got back I didn't know where I was, to tell the truth.

You ask me to suppose a competent switchman who was accustomed to this work was swinging off a train, the vestibule or steps of a train, on the left hand side of the train, meaning the left side as being in the car and looking ahead towards the engine, and ask me when he hit the ground which foot he would light on, right or left foot? I cannot answer the question. Some will light on the right and some on the left. And I cannot tell you whether when he would get off of a moving train he would generally light on the foot nearest to the train; of course I can tell you how I light; I light on my right foot, absolutely on my right foot.

You ask me to assume a man has gotten off of this train on the left hand side as it is going out a few feet past where the board or plank on McKinney Street, along this shell [fol. 86] there, and then ask me from where I saw that track towards the engine how much farther it is to the end of the rail; and I answer—here is the crossing, here is the

rail, we are going this way, this is the left side—no, this would be that way, but anyhow we will use this; this is the crossing and this is the rail. He got off right here, here is the crossing, right about that far, just right about seven or eight feet from the crossing. I have said that that loose rail at that point cleared the outside steps of the car about 17 or 18 inches, something around that. Counsel has asked me whether or not any other person walking around there might have made this track, or words to that effect. Now you ask whether or not the track I saw, the heel print made down into that shell, was such a mark as could reasonably have been made by a man just walking along on the shell, judging from its depth, or was it one that would have been made by hitting the shell harder than that. I answer that it would be just like hitting your foot that way; it was raining and the ground was soft, it was raining pretty hard there too and it had been raining pretty hard since the other time I had been down there. I told them I didn't know whether it was a fresh foot mark or not. I guess when my testimony was taken early in 1920 in this case all this matter was threshed out in my mind. I never thought no more of this case. Of course when I made that statement in 1919 I didn't make nothing but the truth, what I knew of the case. Stating from my best recollection of that heel print. I would say it indicated a foot mark parallel with the rail; by "parallel" you would mean right out here. I have said to the best of my recollection that loose rail was about 17 inches to the left of where the step would come down; you know the distance of the step, about 17 or 18 inches. For instance taking the Judge's desk, here is the main line going out, we will say this is the left hand rail, here is another rail, this is the left hand rail, [fol. 87] this is McKinney Street crossing, here is where your rails lie, we are just giving you that distance, here is where your rails are, this is your loose rail, here is your right hand rail, here is where your foot print was, right here. It would be just about a step from where that foot print was to get opposite the end of the rail.

I have had pictures shown me here purporting to have been made three days after the fatal accident. Those rails were not moved before that picture was taken; I know they were not moved at that particular place; I was not there

when the picture was taken but I saw them out there taking the picture; I saw him taking the picture and they said they were taking a picture of the place; I did not stay there to see it taken, I was working. Here on the stand is the first time I have seen the picture.

I did not see a man's shoe lying around there that night. I saw a shoe but the fellow told me it was Preston's shoe. You see I left, I went down to telephone for the Judge and when I got back of course they told me there was a shoe down there, and that is all I know of it. That night I walked down and looked at the trucks, and when I came down they handed me this hat. I went over in the coach yard and I came back up there and I saw a spot of blood, and I walked up to the coaches and Mr. Cloud said "Have you got all your crew, Mike?" I says, "No, I am looking for Preston." He says, "There is a man lying dead on the crossing," and with that I went over; well I identified Preston, so I just turned around quick and I ran down to McKinney Street and jumped on an automobile and went to the big factory and telephoned to Judge—the Justice of the Peace down here, I forget his name. The next morning I saw little pieces of jumper lying along the track there; I could not tell whether it was pieces of shirt or jumper. They told me there was little pieces of flesh along there that [fol. 88] had been dragged off.

(Whereupon adjournment was taken to 9:00 a. m. November 28, 1922.)

M. A. Moore continued cross-examination as follows:

There were four or five cars in this Santa Fe train that was being taken out to put on the side track that night, there were two baggage cars, two chair cars or a combination, I disremember whether there were four or five. We picked up this string of passenger coaches in just the condition they came in and discharged the passengers, we just picked it up. I never inspected and could not tell you whether the chair cars were entirely closed or open. They were vestibuled cars, the Santa Fe has all vestibule cars. The two passenger coaches that I call vestibuled have all the space closed between the two cars. If a man fell any-

where he could not very well fall between those cars on the track; he couldn't very well fall with a vestibule; he would have to fall off the steps if he fell. By falling off it wouldn't bring him between the rails of this particular track or train; I don't know how he fell though, I don't know how it happened. He could not have fallen under this train from between those vestibule cars before he got off on the ground; there wasn't no way to fall in there. Preston could not have gotten in between the bumpers, you know, because there is a vestibule; in a vestibule train both platforms are covered to keep passengers from falling off of there, then they have vestibule doors on the side, they close the train; of course you would have to have the vestibule doors open to get off of it.

I don't exactly know the width of a passenger coach, but I judge it is about nine feet. The outside of the step extends about four to six feet, something like, over the rail; those steps don't go out, they go down like that; I don't [fol. 89] know but I guess they extend four to six feet, something like that.

I say the next morning when other members of the train crew and I were examining the track just the other side of McKinney for evidences of any kind, that I saw some bits of jumper and shirt and flesh along the track. That was on the same track on which we pulled the train out from the depot, on the same track we found the body, the outbound main. I gave Preston orders to make coupling onto another car that was standing on the rip track, but he wasn't there to make it; I made it myself. That rip track upon which this car stood was to the left of this main line Santa Fe outbound (when saying "left" meaning sitting in that Santa Fe train going towards Galveston), then that would be on the left. Between that rip track upon which this empty car stood that we wished to couple onto our train there was the main line inbound track. The switch point where the rip track came into the track we went out on was past Milby Street, and this empty car that I was to couple onto our Santa Fe train was between Milby and McKinney, nearer to McKinney Street. Preston had two duties to perform after he got off that Santa Fe; one was to guard the end of the train when it backs up to see it don't bump too hard on anything, and one was not to hit anybody; what

he had to do was to couple onto that coach and jump it over the crossing.

Redirect examination:

When a switchman swings off of a car that is in motion, he always swings toward the train; I get off rightfooted; I don't know how everybody gets off of a train but I get off right footed, you know, and I always go from the train. It is true that every man, whether you get off on the right or left foot, angles away from the train when he gets off, and leans back in order to overcome the momentum when he gets off; you get off that way when you go away from the train.

[fol. 90] I was asked by counsel whether or not a man being inside of a vestibuled platform could get down underneath so as to be run over. Such a man could, if he is standing on the steps and a very severe wind is blowing, a gale, he might somehow be caused to slip or fall and become entangled so as to be dragged under there; he could catch on; you know in all vestibuled cars they have got a little trap door; of course that trap door could fall, you see, and could catch a rain coat or catch on anything, you know, and cause it; you see the wind blowing, it might have blowed him; I wasn't there to see how it happened. The trap door could blow and catch his raincoat and then he would drag underneath. Of course he could, if he fell on the ground, if he wouldn't get to his feet again, he would have to go somewhere, wherever the track would hit him. I did not inspect the character of the steps to see whether or not they were of a character to be let down. They have got a drop step on them. I have seen that type of drop step; I have seen it on Santa Fe cars. That step you know is a drop down step. They use it instead of using a bench for the passengers, you see, to get off at the depot; it is a step that drops low to the siding. Of course if that step was used he might get in trouble with it and he is liable to be caused to fall if he wasn't looking for it, don't you see, but I never examined the car that I could say what kind of step was on the car.

JOHN H. ROSE, a witness for plaintiff, testified as follows:

My name is John H. Rose. I am in the life insurance business; I am with the Reliable Life, holding the position of Manager of the South Texas Office. Life insurance companies have the American Experience Table of Mortality. I have that before me. According to the American Expe- [fol. 91] rience Table of Mortality the life expectancy of a man twenty-nine years of age would be thirty six and three-hundredths years, or a little over thirty-six years.

A. H. MCDANIEL, recalled by defendant, testified in person as follows:

My name is A. H. McDaniel; I live at 917 Pinckney Street, Houston Texas. I am a switchman for the Houston Belt & Terminal Railway Company. I have been working for the Belt since 1912, and prior to that I had railroad experience. When I say I have been working for the Belt since 1912 that includes the period of Federal control also.

I knew W. P. Preston during his life time. I worked with him on the same crew for the Belt Railroad. I recall the time when he met his death. That was the night of the Corpus Christi storm, September 14, 1919. I was a member of the same crew with him that night. He had been a member of that crew something like about two or three years, on the same job. Preston had worked on that crew with me previously. I cannot recall exactly how often, he was an extra man for a while and I don't know how often he did work on the job until he got on the job regular in Parlan's place. An extra man would fill the position of some man who wanted to be off for a day or so. Preston was around McKinney for quite a while working on this crew; every time that we went to the rip track he would be around McKinney. The crew did not have occasion to go there unless they went in there to do some work. We had occasion to go there if we was working on the rip track. Sometimes this crew would be there two or three times during eight hours of service.

I had seen the rails that were lying there loose between the main line tracks a short time before Preston met his

[fol. 92] death; I don't know how long they had been there but I had noticed them there several times. If a switchman was getting off out there to switch the rip track or doing anything in that vicinity, there was nothing that I could see to prevent his seeing those rails and knowing they were there. There was no way for him to fail to see them unless it was dark and he had not been out there in day-light. I believe there is an arc light on the south side right at the rip track. Preston had been out there in the day time.

I was on this Santa Fe string of passenger coaches that was being taken out there to be placed on the rip track, I was one of that crew. In going out I rode in next to the rear car; I was following the engine. I had no occasion to get off until I got down to Milby. I did get off beyond Milby at the cross-over switches. I threw a switch down there. That was part of my job as the man that followed the engine. After I got down there and after I threw the switch, the string commenced to backing into this rip track at once. I signalled the engineer to come on, for at that time I did not know anything about Preston having met with an accident. I did not see him get off the train. I could not say on which side he got off the train. After this movement back into the rip track it seems like I mentioned to the foreman of the engine about Preston; I did not see the light down there. The engine foreman got off and lined up the switch for the rip track. I threw the cross over switch and he lined the switch up for the movement into the rip track, and then I came back up to where he was and I said I did not see Preston's light down there. Then I continued the movement of the string of cars on down and I disremember whether I made the coupling into that car that was standing there or the foreman did, one of us did, we was both right on there, but I don't remember which one made that coupling.

[fol. 93] I think it was Wylie Thomas who first found Preston dead. We found Preston's lantern down near the rip track, near McKinney Avenue, right near the rip track, and a car inspector found his hat. I don't know where it was, he had the hat when I seen him.

My attention was called to a mark in the shell to the left of the outbound main line in the discussion there about the death of Preston; I looked at the particular mark that was

under discussion. I could not swear it was a heel print, I could not tell whether it was a heel print. If it was a heel print it was close enough to McKinney Avenue that it could have been made by any member of the crew or any passerby, I suppose. I had been switching out there that afternoon a comparatively short while before this particular trip. I judge this particular mark to be somewhere about two or three feet, as I remember, from the end of the board, it was about the center of the two main lines, which would make it about two and a half feet, something like that, to the left of the east rail of the outbound main track.

I know the location of the loose rails that were there. This mark was about eighteen inches or something like from the near end of the nearest rail. When a switchman swings off a moving car he swings from the train, faces from the train as he hits the ground, and if he stumbled, being in motion and facing that direction, he would naturally fall from the train or from the cars he got off of if he fell forward.

I saw this man on the car that night before he went to the platform to get off. He had on a jumper, had on light blue pants, had a slicker on, a long slicker; I don't know whether that slicker was buttoned or not, I just remember he had on a slicker. After the accident I never did go up to the body but they say they did not find much of the [fol. 94] slicker or much of his clothes either, they were pretty well torn up.

The wind was pretty high that night, and it was raining. The wind was from the east; that would be blowing straight against the left side of that train as we went out, it was coming in dashes, that way.

Cross-examination:

Main Street runs nearer north and south by the compass I supose than any other direction. This particular track on the Santa Fe, main line tracks coming into the depot, they run north and south on McKinney Avenue, then they run east and west into the Union Station. That is Texas Avenue that the street car goes out on that passes the Union Station; that does not run at right angles to Main Street. In leaving the Union Station going out there on

the outbound Main line of the Santa Fe, when you come to McKinney Street you are going south, I think it is on the left, it is on that left hand side of the rip track on McKinney. Four tracks intervene between the rip track and the outbound main line Santa Fe. I don't remember exactly where this car that was to be coupled onto the Santa Fe train was. I expected to see Preston's light down there about where that car was, it was his duty to couple onto; that was the first thing I missed, his light not being where it should have been. Going out on this Santa Fe main line that rip track is on my left,—going south it is on the left hand side; there are four intervening tracks but I don't know what the distance is out there. If it was the duty of the long field man, who was Preston at this particular time, after getting off of the Santa Fe train to go over and make that coupling, then back up, I can conceive of no reason why he should have gotten off of the right hand side of the train.

[fol. 95] J. B. QUARLES, a witness for defendant, testified as follows:

My name is J. B. Quarles; I live in Houston. I am a city fireman. I have been in the railroad service for seven years, at one time working on the Houston Belt & Terminal Railroad. I just knew W. P. Preston when I seen him, I did not know him personally. I was not a member of the same crew with Preston the night he met his death, I was a car man; I was in the vicinity, however, the night he met his death. The first thing that attracted my attention to the fact there was something wrong out there was when I found his hat. Shortly before I found this man's hat I had come down from the Union Station to the coach yard in this Santa Fe 5 equipment and had gotten off where they stopped it and started across to the shanty over there where they stay, and I picked up his hat. The carmen's shanty is back on the west side of the tracks there, of the coach yard, it is further back than the switchman's shanty, further on the other side. On that occasion I got off on the west side of the train; that is the side the shanty was on, and I started to cross the track to the shanty. When I picked up the hat I was not thinking about anything, you

know, and I just thought his hat had blowed off and I am not clear on just where I found the hat unless it was between the tracks of the inbound main, but I think, the best that I can remember is, in between the tracks of the inbound main; that is the best I can recall. I got off on the right hand side. The train pulled down and backed in, you know, and backed into the track and I got off then, which would be the right hand side facing the train. I got off after the train had come to a stop on the rip track. It was stopped with the usual clearance from the crossing at McKinney, and that was something like thirty feet or more. [fol. 96] I was riding on the rear car, I got off of the rear end; I walked towards McKinney Avenue, right towards the Watchman's shanty; it was in going there I picked up this man's hat; the best I can recall it was between the inbound main.

I was present when his lantern was picked up. The best I can recall, that was between the inbound main and the long rip, we call it there, the next track over.

My attention was called to a mark in the shell near the McKinney crossing, and also between the two main lines. That mark looked something like the print of a man's heel, but I could not say that it was, it was not a perfect print of a heel but it looked something like a heel, but I could not state for certain whether it was; I would not undertake to swear it was a heel. I judge it was something like six or eight feet from the board walk across McKinney, but I did not measure; it was somewhere between the tracks there, I judge it would be three or four feet from the east rail of the outbound main.

There were rails lying between the two main lines. This mark was something like two or three feet, the best I can remember, from the end of the nearest rail.

I had never been to the switchman's shanty.

Cross-examination:

I am quite familiar with all the trackage out there. If I were sitting in the train facing the engine going out, as I was that night in that train, the inbound Santa Fe would be on my left going out; it would be on my left as I was leaving the Santa Fe Station; then there would be the long rip, the short rip and the inbound Santa Fe main to my left as I went out, crossing McKinney Street.

I was car inspector and my duties had to be performed on that Santa Fe after the switch crew finally left it stationary somewhere; I could not do my work on it while it [fol. 97] was running. I was oiler and inspector at that time; that is what some of the railroad people call the car knocker, I am the car knocker. It is my understanding that that Santa Fe train had been stopped here that night and diverted from the trip to Galveston on account of the storm. As to whether I know what was done with that train the next morning, will say I am a car man, I am not a switchman and I did not handle that part of it at all; I don't know whether that train completed its journey here or whether it did go on to Galveston the next morning.

I disremember where the arc light is, but the coach yard has several large lights; the coach yard is over to the right. When Preston got killed it was a stormy night, a bad night.

I never saw any heel mark that I remember. I do not remember who first called my attention to that particular mark that looked like a heel mark. I suppose there had been lots of people walking around there all day and a good many that evening.

I walked down the line with them that night and somebody picked up a shoe, that is the only thing they found. I did not look the next morning, I only work at night from three to eleven o'clock.

T. C. Morris, a witness for defendant, testified as follows:

My name is T. C. Morris, I live in Houston; I am now employed by the Houston Belt & Terminal Railway Company as a crossing flagman. My present station when I am on duty is at Odin and Mary Streets in the Fifth Ward. I have been a flagman at the McKinney crossing.

[fol. 98] I knew W. P. Preston. I was employed by the Houston Belt & Terminal Railroad under the Federal administration the night of this occurrence when Preston met his death. I did not see Preston dead, I did not go down to where he was; I was on duty that night. I saw Preston the night before, when I went on duty, that is the night before he was killed, there at the McKinney crossing; he was on duty at that time in the course of his duties as a

switchman, he had got off there. While I was on duty at the crossing I saw Preston every night, he was on the night crews; I could not tell you exactly how long I had known Preston but it was about a month or so; he would be talking there to me at times when he would be running on down to come into a switch, he was what they call the end man; I had occasion to see him rather frequently out there at McKinney crossing.

I don't remember the young fellow's name that first advised me of this man's death, he found the hat in the first place, he fetched the hat around and said one of the switchmen has lost their hat, and I says, "let me have it and when they come around I will give it to him and he can get it back again," so he had to come around on the west side of the main line on the rip tracks there and he forgot something on the east rip track and went back for it, so he asked me for the hat and took it back to Mr. McDaniels I think it was, gave him the hat, and they got to looking around and found the lantern. I saw this young fellow pick up the hat, it was off east of the main line and I think between the long rip track and the short; I was speaking of the hat; it was not between the main line and the rip, it was just over the first rip track. To be truthful with you I don't know which one of the rip tracks the Santa Fe train had been place- on. I was standing out in front of my shack on McKinney and I don't know exactly how far the hat was at the time this man picked it up directly to the Mc- [fol. 99] Kinney crossing, that is the board walk. I noticed when he picked the hat up, he spoke and he says, "one of the switchmen has lost their hat." He fetched it over and gave it to me and the hat was wet and heavy. This was not found after they had placed the cars that they brought out there; they was backing up when this fellow found the hat, whatever his name was that worked on the car, and he happened to be coming up there and picked up the hat just across the first rip track, I mean just across the first rip track from the main line, in other words going from the incoming main line. Going from the incoming main line towards the east you would cross the first rip track and then come to the point where the hat was found. That track runs parallel, we will say that this represents the inbound main line coming towards town, now then the rip track would be over here to the east, and the hat was found beyond this rip track over to the east.

I saw the lantern picked up also, I was with him at the time that was picked up; it was still beyond this, laying up near the rails, between the ties of this same track that the hat was on, the same rip track.

My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two main line tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh and we supposed it to be the heel mark where he lit; that was the supposition. They all thought it was where Mr. Preston got off of the coach. I don't think there was anybody saw that man get off. There was not a man that I saw that seen Mr. Preston get off the train. I surely could not tell from looking at that heel mark who made it.

[fol. 100] I was supposed to go on duty at ten o'clock; I usually aimed to get there all the way from a quarter to a half hour ahead of time. As quick as I go on duty the man I relieve I take his place. I could not tell exactly just what time I went on duty, but it was somewheres near ten o'clock. Directly after I went to work the train came down. It was usual for the end man to get off there. I could not say there was any peculiarity about that heel mark that would have prevented it from being made by someone else; the only thing about the track was, it looked fresh; I probably wouldn't know the difference between that and one made a half hour before; I don't suppose I could define any difference between such a mark and one made an hour before.

That was the night of the storm, the wind was blowing; I declare I could not tell you how strong the wind was, but it was blowing mighty hard. I had reason to notice the violence of the wind. When those coaches usually go by me it didn't seem like there was much wind, but when the train passed me and the wind came against me I had to jump around to keep from going over. When the train was going by me it was a protection to me from the wind, and when the train cleared I felt the wind especially strong. I had a slicker on myself and I had to jump around to keep from falling over.

Cross-examination:

I say that I was the crossing watchman at McKinney and Santa Fe tracks on the night that Preston was killed. In leaving the Santa Fe, going out there on the Santa Fe main line, where it crosses McKinney Avenue, my shanty would be to the right of the main line if a person were sitting in that car going out on that track; my shanty was about five or six feet from the outbound main line Santa Fe. My [fol. 101] duty was to flag McKinney Avenue at the approach of any train in either direction that was to cross that street. I did flag this outbound Santa Fe that was being dragged out to the Santa Fe for storage that night; after I flagged it I stepped back to the curbing but I did not go into my shanty. If Preston had gotten off of the right hand side of that train, on the side next to my shanty, I would have seen him get off. I am prepared to tell the jury I did not see him or any other man get off on the right hand side of the train. I stood right there.

I am sixty-nine years old, I am not a very strong or robust man. My opinion is that when this train went by that night and this wind was blowing, it would pretty near upset a man like you or me or any other man. If I were not expecting it, being on the sheltered side of the train, then when it suddenly went by, I certainly would feel it. If I were on the other side of the train and following the wind, I don't know whether it would overbalance me that way. At that time we all know that storm, it seemed like it come in gusts. I haven't the least idea how Preston's hat got where it was. I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was farther over to the left but just about the same distance from McKinney Street. The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street.

[fol. 102] D. E. PROPER, a witness for defendant, testified as follows:

My name is D. E. Proper, I live in Houston and I am now employed by the Houston Belt & Terminal Railroad Company as civil engineer.

I have a blue print here showing the railroad tracks over McKinney crossing and in that vicinity, and on up to the Union Station. The blue print was made in our office from the tracing which was made in 1916 for the purpose of valuation. It is a part of the records of the office of the engineer, and I took it from there. I have personally checked with reference to the blue print and the situation on the ground some measurements at your request. (Witness was asked to exhibit the blue print to the jury in order to give them some idea in reference to the directions of the compass.) The Union Station itself is farther up; we have noted in here "To Union Station." In going from the Union Station I would follow the line of your finger down here; this is the outbound main track. Your finger at this time is at the curb line of McKinney Avenue on the Belt tracks; this is the outbound main. My indication of the compass is right here. From the time that the track leaves the McKinney crossing it is going almost south, and after you leave McKinney going towards the Union Station it turns slightly to the west. There are five tracks that cross McKinney Avenue and there are four rip and coach storage tracks that stop. Beginning at the outbound main there are five tracks at 14 foot centers going east from the outbound main, and west from the outbound main is one at 50 ft. and one at 16 feet from that, and one at 13 and one at 16 again. The distance from rail to rail between the inner rails would be 9 feet 4 inches. The distance from [fol. 103] near rail of inbound main to near rail of the first rip would be 45 feet 4 inches, and the distance from that rip to the next rip, rail to rail would be 11 feet four. The width of a standard railroad track rail to rail is four feet eight inches. The over-hang of standard passenger equipment on the rail is approximately two feet five inches; that may vary an inch perhaps, I would not want to say exactly whether it would or would not be more than an inch, but you look down on the train and see the coaches, there

is not much more than an inch variation between any of the coaches, that is about it, 2 feet 5 inches.

The width of McKinney from curb line to curb line is 30 feet, the full width is 50 feet; there is really no board walk across the street, but between the tracks it is 30 feet wide.

This is Milby Street here, it does not parallel McKinney. Milby and McKinney intersect at a point southeast from the crossing. The distance from the intersection over McKinney along the tracks to the intersection over Milby is about 760 feet, that is from the south curb line of McKinney to the south line of Milby. The arclight is on the south curbline of McKinney and it is 25 feet from the center line of the farthest track to the east, which would make it approximately 67 feet from the center line of the southbound main line track. That arc light is I should judge about 25 or 30 feet up.

Defendant offered in evidence the blue print testified to by this witness. Same is hereto attached and marked Exhibit A.

Defendant rests.
Plaintiff rests.

[fol. 104] Plaintiff withdrew announcement of resting for the purpose of filing a trial amendment on her behalf as Temporary Administratrix and Personal Representative of the Estate of W. P. Preston, deceased, the Court granted leave to withdraw the announcement of resting, and the following evidence was offered on November 29, 1922, at 9:00 o'clock A. M.

Plaintiff offered in evidence certified copy of the proceedings in Cause No. 11,054, in the matter of the Estate of W. P. Preston, deceased, in the County Court of Harris County, Texas, showing the appointment and qualification of Mrs. Mary Preston as the Temporary Administratrix and Personal Representative of the estate of said W. P. Preston, deceased, and which shows her authority to prosecute this suit in such representative capacity.

OFFER IN EVIDENCE

"In the County Court of Harris County, Texas, Sitting in Probate, Nov. Term, 1922

No. 11054

"In the Matter of the Estate of W. P. PRESTON, Deceased

"THE STATE OF TEXAS,
"County of Harris:

"To all to whom these presents may come, Greeting:

"Be it known, that whereas, it having been made known to me as County Judge of said County, that W. P. Preston departed this life on the 14th day of Sept. A. D. 1919, in the County of Harris in the State of Texas, where the said deceased had his residence and domicile prior to and at the time of his death, and that he died possessed of an estate consisting of real and personal property of the probable value of $250.00 Dollars.

"And it appearing to me in my official capacity, that it would be to the best interests of the estate of said deceased, [fol. 105] that the following matters concerning the estate be attended to at once, viz: that the applicant after qualifying, make herself a party plaintiff in a representative capacity in cause No. 87,829, styled Mary Preston vs. Walker D. Hiner now pending in the 80th Judicial District Court for Harris County, Texas, and to prosecute said suit in her representative capacity as temporary admx. and personal representative of the estate of her deceased husband W. P. Preston for the benefit of the beneficiaries of said W. P. Preston and his estate as prescribed by the Federal Employee's Liability Act and further, that the interests of said Estate require the immediate appointment of an administrator, and that Mary Preston who has made application therefor to me, is a suitable person to act as Temporary Administrator of said estate.

"Now, therefore, I, Chester H. Bryan, Judge of the County Court in and for the County aforesaid have on this the 28th day of November, A. D. 1922, and do hereby appoint the said Mary Preston Temporary Administrator of the Estate of W. P. Preston, deceased, with authority and full power to make herself a party plaintiff in the above

styled & numbered cause pending in the 80th Judicial Dist. Court for Harris County, Texas, and prosecute the same for the benefit of the beneficiaries of the estate of said W. P. Preston, deceased, as provided in Federal Employee's Liability Act, and for the faithful performance of which, as well as of all duties under this appointment, the execution of a good and lawful bond in the sum of Five hundred dollars, is hereby required of *him*, the said Mary Preston as such Temporary Administrat*or*.

"And it is hereby ordered that this appointment shall not take effect nor be delivered to the said Temporary Administrat*or* until the same shall have been recorded in the Probate Minutes of Harris County, and until the Clerk [fol. 106] of this Court shall have endorsed on this appointment, a certificate that the same has been so recorded, and until the said Temporary Administrat*or* has taken the oath and has given bond as required herein and as required by law.

"And ordered that this appointment shall cease to be of force on the day designated for taking up probate business at the January Term, A. D. 1922, of this Court, the same being the first term of the Court *Court* held next after the date of this order, unless at that term it be continued in force by an order entered upon the minutes in open court;

"And further ordered that the said Temporary Administrat*or* shall have and exercise only such rights and powers with regard to this estate, or such portions thereof as are or may be committed to *his* charge, as are specifically and clearly expressed in this order and appointment and that at the expiration of the term for which *he* is appointed, *he* shall file with the Clerk of the County Court of Harris County, a list of all the property of the estate which has come to *his* hands, a return of all sales made by *him*, if any, and a full exhibit and account of all *his* acts as such Temporary Administrat*or*, all of which shall be verified by *his* affidavit.

"Witness my hand and seal of the County Court this the 28 day of Nov. A. D. 1922.

"Chester H. Bryan, Judge County Court, Harris County. (Seal.)

"Attest: Albert Townsend, Clerk County Court, Harris County, Texas, by D. E. Lusher, Deputy. (Seal.)

[fol. 107] "Bond

"In the County Court, Nov. Term, 1922

"THE STATE OF TEXAS,
"County of Harris:

"Know all men by these presents:

"That we, Mary Preston as Principal, and Robt. L. Cole & R. J. Jones as sureties, are held and firmly bound unto the County Judge of the County of Harris, and his successors in office, in the sum of Two Hundred & Fifty dollars; conditioned that the above bound Mary Preston who has been appointed by the County Judge of Harris County, Texas, Temporary Administratrix of the estate of W. P. Preston, deceased, shall well and truly perform all the duties required of her under said appointment, and will pay unto the officers of said court all costs that have accrued or may accrue in the said above entitled and numbered estate.

"Approved, this the 28 day of Nov. 1922.

"Chester H. Bryan, County Judge, Harris County, Texas. Mrs. Mary Preston, Principal. Robert L. Cole. R. J. Jones."

"Oath

"I do solemnly swear that I will well and truly perform the duties of Temporary Administrator of the estate of W. P. Preston, deceased, in accordance with law, and with the order of the court appointing me such administrator.

"Mrs. Mary Preston.

"Sworn to and subscribed before me this 28 day of Nov. A. D. 1922. Albert Townsend, Clerk County Court, Harris County, Texas, by M. Lockhart, Deputy. (Seal.)

[fol. 108] "Filed Nov. 28, 1922. Albert Townsend, Clerk County Court, Harris County, Texas, by D. E. Lusher, Deputy.

"STATE OF TEXAS,
"County of Harris:

"I, Albert Townsend, Clerk County Court Harris County, Texas, do hereby certify that the above and foregoing is a

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true and correct copy of Order, Bond and Oath in the Matter of the estate of W. P. Preston, deceased, as the same appears from the record in my office recorded in Probate Minute Volume 57 at page 156.

"Given under my hand and seal of said court at office in Houston, Texas, this 9th day of February, A. D. 1923.

"Albert Townsend, Clerk County Court, Harris County, Texas, by B. I. Wagner, Deputy. (Seal.)"

Mrs. Mary Preston, recalled, testified as follows (questions by defendant):

My husband, as this evidence shows, was killed or met his death in September 1919. From that time until yesterday I took no steps whatever to be appointed or qualified as administratrix of his estate. He had some insurance in the brotherhood that he belonged to. Surely I got that, his brother got it and then gave it to me. The reason for him collecting it, it was made out to him when he first took the insurance out, long before we married, and was never changed because we never thought anything about it.

When I was on the stand before I was asked if it was not a fact that I first learned about my husband's death from a friend of mine. I had testified that I had been in [fol. 109] correspondence with my husband, and that there had been a lapse of practically two weeks when I had not heard from him, but I did not think anything of that because he was a man that did not write very often. I answered his letters regularly just as soon as I got them.

Testimony closed.

"Exhibit A"

(Here follows exhibit, marked side folio page 109½)

[fol. 110] In District Court of Harris County

Agreement re Statement of Facts

We agree that the above and foregoing 65 pages contain a full, true and correct statement of all the facts admitted

in evidence by the Court upon the trial of this cause; and we further agree that this record shall be filed as the statement of facts in this case.

McDonald & Wayman, Cole & Cole, Attorneys for Plaintiff. Andrews, Streetman, Logue & Mobley, Attorneys for Defendant.

In District Court of Harris County

Order Approving Statement of Facts

The above examined, approved and ordered filed as the statement of facts in this case, this the 24 day of March, A. D. 1923.

Harvey, Judge 80th Judicial District of Texas.

[File endorsement omitted.]

[fol. 111] In Court of Civil Appeals of Texas, First Supreme Judicial District

No. 1112

James C. Davis, Federal Agent,

vs.

Mrs. Mary Preston

From District Court of Harris County

Opinion by Associate Justice Walker

Judgment—May 1, 1924

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant, James C. Davis, Federal Agent, and the surety on his appeal bond, Fidelity & Deposit Company of

Maryland, pay all costs in this behalf expended, and this decision be certified below for observance.

IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

OPINION—Filed May 1, 1924; in Supreme Court June 28, 1924

This suit was instituted on the 27th day of February, A. D. 1920, by appellee, in her individual capacity, against Walker D. Hines, Director General of Railroads, to recover damages for the death of her husband, which occurred on or about September 15, 1919, occasioned, on her allegations, [fol. 112] by the negligence of the defendant in leaving certain steel rails in his switch yard. On the 31st day of May, 1922, in her individual capacity as plaintiff in this case, she filed and presented a motion to substitute James C. Davis, Federal Agent, as defendant, in lieu of Walker D. Hines, Director General. When the suit was filed, citation duly issued to and was served on the Director General in the manner provided by law. While permission had been granted to substitute James C. Davis as Federal Agent, no pleading was filed against him as such until November 27, 1922, on the eve of the trial of this case. Her petition filed on that date was in her individual right, and predicated the damages claimed upon substantially the same allegations as obtained in the original petition filed against the Director General. On November 28, 1922, after the evidence was all in, the plaintiff presented a motion requesting the court to permit her to file a trial amendment for the purpose of appearing as administratrix of the estate of her deceased husband, W. P. Preston, which permission being granted, the amendment was filed, and the suit proceeded to final judgment in her favor as such administratrix against James C. Davis, as Federal Agent. This was her first appearance as administratrix in the case.

It was provided by Congress that Federal Control of Railroads should terminate as of date March 1, 1920. This Act provided that suits pending against the Director General at the termination of Federal control should not abate,

"but may be prosecuted to final judgment, substituting the agent designated by the President under Subdivision (a)" (Transportation Act, 1920, p. 118). Section 1594, U. S. Compiled Statutes, provides that such substitutions as provided for in the quoted section of the Transportation Act [fol. 113] must be made within twelve months after the right accrues (Lecrone v. McAdoo, 353 U. S. 217-219). Because of this construction placed by the Supreme Court upon the Transportation Act, appellant now insists that the court erred in permitting appellee to substitute the Federal Agent as defendant more than two years after the cessation of Federal Control. We think that this ruling of the court was justified by the Winslow Act, passed by Congress on the 3rd day of March, 1922, as an amendment to the Transportation Act of 1920. The Winslow Act specially mentioned Section 1594, and states that the purpose of the Act was to relieve litigants of the provisions of Article 1594, and further:

"Actions, suits, proceedings, and reparation claims, of the character described in subdivision (a), (c), or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under the subdivision (a), but may (despite the provisions of the act entitled 'An act to prevent the abatement of certain action,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office."

Appellee's cause of action comes within the provisions of this Act. This provision of the Winslow Act has been directly construed as sustaining the trial court in his ruling substituting the Federal Agent for the Director General. In Cohen v. Davis, 142 N. E. 75, it was said.

"(1, 2) As the cause of action in this case arose during federal control of the railroad, it is now settled that the action should have been brought against the government and not against the railroad company. Missouri Pacific

Railroad v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087; Nominsky v. New York, New Haven & Hartford Railroad, 239 Mass. 254, 132 N. E. 30. The contention of the defendant that the representative of the government cannot be made a party by substitution in any case where the [fol. 114] action originally was wrongly brought against the railroad company is contrary to recent decisions of the court. Aetna Mills v. Director General of Railroads, 242 Mass. 255, 136 N. E. 380; Genga v. Director General of Railroads, 243 Mass. 101, 110, 111, 137 N. E. 637; Director General of Railroads v. Eastern Steamship Lines, Inc., 245 Mass. 385, 139 N. E. 823.

"(3) The defendant further contends that in no event can substitution be had later than two years after the end of government control. It is true that Section 206 (a) of Transportation Act 1920 (41 Stat. at Large, 456 (U. S. Comp. St. Ann. Supp. 1923, Par. 1007¼cc), provides that, after the termination of federal control, actions arising out of the operation of the railroad while under such control should be brought 'within the periods of limitation now prescribed by state or federal statutes but not later than two years from the date of the passage of this act.' But that sub-section purports to deal only with the time within which actions may be commenced, where the cause thereof arose during federal control and no action was brought during that period. In the case at bar, the action was begun January 9, 1920, about two months before the termination of federal control. The sub-section of the Transportation Act here applicable is 206 (d), which provides that such actions 'pending at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the president under subdivision (2)'. This sub-section contains no time limitation. De Witt v. New Haven Central Railroad, 119 Misc. Rep. 456, 196 N. Y. Supp. 870; Henry v. New York Central Railroad, 204 App. Div. 491, 494, 198 N. Y. Supp. 542; Hanlan v. Davis, 276 Pa. 113, 118, 119 Atl. 822. Even if section 206 (a) were applicable, the Massachusetts law as to admendments does not regard such substitutions as the commencement of a new action, and it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since

the termination of the federal control. Aetna Mills v. Director General of Railroads, supra; Genga v. Director General of Railroads, supra; G. L. c. 231, Par. 138. *In view of the Act of March* 3, 1922, (42 *Stat.* 1443), *amending Transportation Act* 1920, *Par.* 206, *we deem it unnecessary to consider the Act of Congress of February* 8, 1899 (U. S. Comp. St. Par. 1594), *limiting the time for substitution of a successor in office.* See Sack v. Davis, 245 Mass. 114, 139 N. E. 819; Director General of Railroads v. Eastern Steamship Lines, Inc., supra. We are of opinion that the motion to dismiss was denied rightly." (Italics ours.)

Nor was appellee's cause of action barred by the two years' statute of limitation because she instituted the suit in her individual capacity, and did not make herself plain-[fol. 115] tiff in her representative capacity until more than two years after the death of her husband. Bird v. Railway, 207 S. W. 518; Pape v. Railway, 109 Texas, 311; 207 S. W. 514. See also Railway Company v. Kinney (U. S.), 67 Law. Ed. 136.

Appellee sought to establish the cause of her husband's death by circumstantial evidence ,and predicated her cause of action upon the negligence of appellant in leaving steel rails on his yard. We take the following statement of the nature and result of this suit from appellee's brief:

"In the case at bar the grounds of negligence alleged are: (a) leaving the loose rails in the switch yard where appellee would trip on them, (b) failure to provide a reasonably safe place in which to work, and (c) failure to warn deceased that the rails were where he would have to alight.

"The following is a summary of the material facts:

"A switching crew, of which W. P. Preston was longfieldman, on a rainy, stormy night was engaged in moving certain coaches from union station in Houston to a storage track, the end of which abutted on McKinney Avenue. To reach the storage track, the coaches were moved from the station on the 'outbound main line' track which ran in a southerly direction where it crossed McKinney Avenue. There were five tracks that cross McKinney Avenue and four that abut on the street. The five tracks that cross McKinney were on 14-foot centers looking east from the outbound main. The inbound was next to the outbound

main. This would make the inbound main on the left-hand side of the coaches when crossing McKinney going south. Looking west at McKinney from the outbound main, there was a rip or storage track at 50 feet, one at 16 feet from that, another at 13 feet from that and another at 16 feet from that. These abutted on McKinney Avenue. The coaches were to be put on one of these rip tracks abutting on McKinney. It was in the line of Preston's duty to get off the moving coaches at McKinney when they crossed that street, to signal the engine crew to stop when the coaches, after being backed on to the rip or storage track, came to the proper distance from McKinney. These rip or storage tracks connected with the outbound main several hundred feet south of McKinney. Preston was last seen alive when he walked out of one of the coaches just before they reached McKinney. The switch crew rode in one of the coaches from the station out to McKinney. It was usual and customary for the longfieldmen, in performing this duty to get off at, or just south [fol. 116] of McKinney. Moore says Preston got off on the left hand side. Beginning a few feet south of McKinney, ordinary steel rails for relaying track were strewn between the outbound and inbound main. A few minutes after Preston had gotten off, his hat, wet and heavy, was picked up by defendant's witness Quarles between the tracks of the inbound main, and the lantern between the inbound main and the next track over. These tracks were on 14-foot centers. A newly made heel or foot print was found some two to four feet from the north end of the first rail, lying between the inbound and outbound main. The hat and lantern were found just about the same distance from McKinney. Defendant's witness Morris on this testified:

" 'I judge that heel mark that was talked about there that night was a few feet across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was farther over to the left, but just about the same distance from McKinney Street. The mark I saw that was talked

about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street.'

"Morris saw Quarles pick up the hat and lantern. Other witnesses place the heel track and first rail a little nearer to McKinney. In reference to the heel print, the witness M. A. Moore said: 'I found a heel print there, but I could not swear it was Preston's. From looking at it it looked like it had just been made. J. S. McCloud said a foot print or heel print about a step or two from the end of the loose rail was found that night.' A. H. Daniels testified: 'We found what looked somewhat like a heel print there in the shell; it seemed to be fresh. I don't know, but it was about 18 or 20 inches I guess—something like that—from the end of those loose rails. This footprint in the shell was in the usual and customary place for longfieldmen to get off the train going down there; it was just about the right place to get off on a paved street there.' The witness T. C. Moore testified: 'I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh, and we supposed it to be the heel mark where he lit; that was the suppostion. * * * The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were found over to the left still, and about the same distance from McKinney Street.'

"The lifeless body, badly mangled, was found a few minutes later just beyond Milby Street, some 400-feet from McKinney. Pieces of clothing and other evidence of his having been dragged were found between McKinney and Milby Streets. Moore said of this:

[fol. 117] " 'I walked all the way up the main line to where we found the body to look for blood or other evidence, to locate where Preston might have first fallen or gotten under the train. Near McKinney, as evidence indicating that he had been caught there at the McKinney Street crossing, I saw little pieces of his underclothes and jumper. That was down about—probably a quarter of a block away from McKinney Street. There is 300 feet to

a block. About 150 feet, I guess, from McKinney Street where the first signs I saw that he had been caught.'

"Witness Daniels found one of Preston's shoes 'along the main line about midway between McKinney & Milby.'

"The jury found on the special issues submitted that defendant negligently left the loose rails, as alleged, on which Preston stumbled, causing him to fall under the moving coaches, whereby he met his death. They also found that he did not assume the risk and that it was not an inevitable accident. They affirmatively found on issues requested by defendant that his death was not caused by the force of the wind or by the vestibule door falling against him, causing him to loose his balance; or by the fact that the handhold on the car was wet; causing him to slip and fall; or that he did slip on the wet boards of the McKinney Street crossing; or that his having on a raincoat, coupled with the fact that a gale was blowing toward the train on the side from which he attempted to alight; or the fact that he had on gloves, coupled with the further fact that the handhold from which he was alighting was wet and that a strong gale was blowing toward the train, causing him to slip his hold and lose his balance; or by the fact that the steps from which he alighted were wet on account of the rain, causing him to slip, coupled with the fact that a violent wind in gusts was blowing towards the side of the train from which he attempted to alight; or that his raincoat caught on some part of the vestibule door or other part of the coach from which he was alighting.

"Appellant did not file a motion for new trial. Error is based on the refusal to give a peremptory instruction for defendant. In these circumstances, of course it will be presumed that the trial court found as true all facts necessary to support the judgment deducible from the evidence whether submitted to the jury or not."

Though there is no material conflict in the evidence in this case, the verdict of the jury should be sustained if it has support in reasonable inferences arising on the admitted facts. The negligence alleged and its proximate relation to Preston's death may be established by circum-
[fol. 118] stantial evidence. If the appellee has alleged

and sustained a negligent act by circumstances, and by circumstances has shown that the alleged negligent act was a contributing cause to the death of her husband, the verdict should be sustained, though other contributing causes may be in the case, not arising on appellant's negligence. Appellee established a prima facie case if and when she produced circumstances by which her alleged negligence and its proximate relation to the death of her husband was shown. (Bock v. Felman, 212 S. W. 635.) And she was not under the burden, as claimed by appellant, of excluding all other circumstances that might have caused the death of her husband. While this verdict on circumstantial evidence cannot be sustained if the evidence shows with equal probability that Preston's death was caused by other facts than those alleged, because in that event appellee has not discharged the burden of proof under which she rested, yet if it is more reasonably probable that Preston's death was caused in the manner alleged and found by the jury's verdict than by the other means suggested by the evidence, the verdict must be sustained.

Appellant concedes that negligence could be found against his act in leaving the rails on the yard. In our judgment, the evidence is sufficient to sustain a finding that the heel mark in the shelll was made by Preston, and that in stumbling he lost his hat and lantern. A reasonable inference from the facts of this case that Preston fell against or under the coach at or near where his heel mark was found is a reasonable inference from all the circumstances in this case. If he tripped over the rail, the fact that the rain or wind or other causes not involving negligence on appellee's part or not plead by appellee may have contributed to his fall would not defeat appellee's cause of action, provided it can be reasonably inferred that the rail was a proximate cause of his tripping. It is only neces- [fol. 119] sary for the tripping over the rail, if that inference can be drawn, to be an efficient cause, one of the co-operating causes of the death of Preston. Therefore, it may be conceded that all the facts in evidence surrounding the death of Preston were contributing causes to his death, if the evidence raises a reasonable probability that the rail constituted one of the contributing causes, the jury's verdict must be sustained. And what is there

against that inference? Preston fell under the cars. He alighted from the coach at a place and under circumstances to show he might have tripped over a rail. The heel mark shows he was bodily near the rail. In stumbling over an obstacle, it seems to us more reasonable that he would have dropped his lantern than if he had been driven under the coach by the wind. An inference that he stumbled over the rail does violence to no fact in the case, but is in complete harmony with all other facts. In indulging that inference, the jury could have given due weight to the fact that it was raining, that the wind was blowing, that the deceased had on a long rain coat, that the handholds were wet, etc., but to find that one of these causes was the sole and exclusive proximate cause of the death of Preston would require the jury to discard all evidence in regard to the rail, and to minimize the location of the heel track, and the hat and lantern. A verdict in harmony with all the facts seems to us more reasonable than one in harmony with a portion of the facts and against other facts.

But appellant says, under his proposition, that this conclusion can only be reached by basing one presumption on another. While his proposition is sound as an abstract statement of law, it has no application to the facts of this case, and ignores the further proposition that more than one inference supporting the ultimate fact of liability can be drawn from the same statement of circumstances. In [fol. 120] this case, the circumstances are sufficient to sustain a finding of negligence against appellant in leaving the rails on the yard. Appellant concedes that such a finding has support in the inferences arising from the circumstances of this case. On the issue of proximate cause, it was not necessary to invoke the issue of negligence—that is—it was not necessary first to infer negligence before drawing the inference of proximate cause. Independent of negligence—that is—even if the evidence had failed to show negligence in leaving the rail on the yard, the rail was shown to be a proximate cause of the death of Preston. Then, from all the circumstances, as one of the ultimate facts of liability, the jury inferred or found negligence. Having disposed of that issue, and independent of that finding, the jury again examined the circumstances in evidence, and drew the additional inference of proximate

cause. We have then two independent conclusions drawn from the same statement of circumstances, neither of which rests upon the other. This is not basing one presumption upon another presumption.

The judgment of the trial court is in all things affirmed.

Daniel Walker, Associate Justice.

[File endorsement omitted.]

[fols. 121-129] Motion for rehearing, covering nine pages, filed May 15, 1924, omitted from this print. It was denied and nothing more by order May 5, 1924.

[fol. 130] In Court of Civil Appeals of Texas

[Title omitted]

Order Overruling Motion for Rehearing—May 5, 1924

Motion for a rehearing; the motion is overruled.

[fol. 131] In Supreme Court of Texas

No. 1112

James C. Davis, Federal Agent, Appellant,

vs.

Mrs. Mary Preston, Administratrix, Appellee

Petition for a Writ of Error—Filed June 28, 1924

To the Honorable Supreme Court of Texas:

James C. Davis, Federal Agent, applies for a writ of error from the Supreme Court of Texas to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas for the purpose of having reviewed and corrected errors committed by said Court of Civil Appeals in its

decision and judgment in the above styled and numbered cause. The following grounds for this petition are urged:

Preliminary Statement

This is a death injury damage suit whereby Mrs. Mary Preston, as administratrix of the estate of her deceased husband, W. P. Preston, recovered a judgment against James C. Davis, Federal Agent, in the amount of Thirty-seven hundred fifty and no/100 Dollars ($3,750.00) with interest thereon from November 29, 1922 and all costs of suit. Other matters indicating jurisdiction in the Court of Civil Appeals and the Supreme Court are contained in the opinion of the Court of Civil Appeals and reference is here made to same without express mention at this time.

There will be questions arising under Subdivision 6 of the Jurisdiction Statute by which the jurisdiction of the Supreme Court of Texas is defined as well as questions [fol. 132] under other subdivisions of the said statute; but in accordance with the rules of procedure, those matters arising under said subdivision 6 will be presented in outline before any detailed development of the questions involved.

First Question

It was error vitally affecting the jurisprudence of the State of Texas and of such character that the Supreme Court should review it and correct it for the Court of Civil Appeals to hold, upon the character of testimony offered in this case, that the death of W. P. Preston was proximately caused by negligence of the servants, agents and employes of the Director General of Railroads controlling and operating the Houston Belt & Terminal Railroad and its facilities; notwithstanding the objection made and presented on the appeal that there was not even a scintilla of proof showing, or tending to show in what manner W. P. Preston met his death, the net effect of all the testimony being, as expressed in the opinion of the Supreme Court of Texas in Railway v. Shoemaker, 98 Tex. 451, "that it merely reveals an unfortunate and deplorable occurrence without enabling us to see what each of the parties con-

tributed towards bringing it about, and leaves the case very much in the same attitude as those cited."

The attention of the Court is called to the nature of the transaction which it will be called on to analyze and to the material points in controversy. On the night of the Corpus Christi storm, which occurred on September 14, 1919, W. P. Preston, a switchman in the employ of the Houston Belt & Terminal Railroad then being administered by the Director General of Railroads, somehow met his death near the McKinney Avenue crossing in the City of Houston, Harris County, Texas. A Santa Fe passenger train had come into Houston from the north bound for Galveston. It was an interstate train. The brewing storm required [fol. 133] that the train be held over until morning. The passengers were disembarked and the switching crew, of which Preston was a member, proceeded to handle the string of empty coaches to their proper storage place for the night. Preston was last seen alive by some of the members of the crew as he passed from the interior of a coach to the platform thereof, and was next seen in a mangled condition, which, with other factors to be mentioned, clearly indicated that he had been somehow caught, run over and crushed by the moving cars. The plaintiff, acting by her attorneys, seized upon the idea that certain steel rails placed in the vicinity of the McKinney Avenue crossing for installation in the track might have caused Preston's death and an indentation in the shell ballast, thought by some of the witnesses to have been a heel print, was utilized as a circumstance to show that Preston alighted near one of the rails, stumbled against it, thence under the train and to his death. It is submitted and will be argued that this is pure speculation, because the indentation could have been made by numerous others and Preston could have been caught and killed in a number of different ways. This is a case arising under the Federal Employers Liability Act and consequently the Federal Courts will ultimately have jurisdiction thereof. It is in the interest of the jurisprudence of the State that matters of this character shall not be required to go into the Federal Courts for proper adjudication. It is also submitted as obvious that to permit a recovery of damages upon mere pleadings without proof is perhaps the most serious criticism of the jurisprudence of any State that could be urged.

[fol. 134] Second Question

It is submitted that the Court of Civil Appeals erred in holding that the cause of action asserted, and upon which recovery was allowed, was not barred by limitations and that such action and such error materially affects the jurisprudence of the state and reasonably requires the Supreme Court of Texas to review the same. It will be noted that Mrs. Preston sues as administratrix. It should also be noted, however, that she did not appear in this case as administratrix until after all the evidence was heard and the Court had prepared a tentative charge for the jury. At that time attorneys for Mrs. Preston, who was then suing individually and not as administratrix, came to realize that the requirements of the Federal Statutes were such that a recovery could not be had unless plaintiff qualified and sued as an administratrix. Accordingly, permission was requested and was granted by the Court that she be permitted to appear as administratrix and the record shows that she had to qualify after the trial began in order to accomplish that purpose. Another factor and limitation question is that James C. Davis, Federal Agent, was not a party to the litigation by substitution as required by the 1920 Transportation Act until more than two years had elapsed subsequent to the enactment of said statute and subsequent to the original appointment and qualification of a Federal Agent. Attention is called to the fact that the 1920 Transportation Act provides for a two year limitation with reference to actions brought under its terms and provisions and it is the contention of your petitioner that, notwithstanding the pendency of the action in its original form, brought by Mrs. Mary Preston, individually, as against the Director General [fol. 135] of Railroads and not as administratrix against the Federal Agent, the period of limitations provided in the 1920 Transportation Act would apply and bar any right of recovery under the circumstances. It is urged that there was a complete change of parties after the two year lapse, namely, the substitution of a Federal Agent and the qualification of an administratrix and her appearance as a party plaintiff.

Another angle to the limitation question is that the Supreme Court of Texas, in the case of Bird v. Railway 109

Tex. 323, decides that actions brought by an administratrix suing on account of the death of a decedent under the Federal Employers Liability Act rest upon causes of action which arise at the time of the appointment and qualification of the administratrix and not prior thereto. This decision cites with approval Railway v. Coronas, 230 Fed. 545, L. R. A. 1916 E. 1095, which holds to the same effect, and a quotation from the last named decision is incorporated in the decision of our Supreme Court. This holding means that until Mrs. Preston qualified as administratrix no cause of action of that character was possible; in this sense it was a distinct and different cause of action and could not have been prosecuted without such action being taken. Yet the 1920 Transportation Act requires that all suits brought under its terms and provisions shall be brought within two years after the enactment of said statute and the limitation period does not run merely from the time the cause of action accrued. It lay within the discretion of the plaintiff and her attorneys to take the necessary steps and they failed to do so. Viewed from the standpoint of the period of limitations prescribed in the Federal Employers Liability Act, it is noted that this statute makes the period of limitations run from and after the accrual of the cause of action. If the matter rested solely in that statute, the question would be a different one; but it is apparent that no [fol. 136] right to have money paid by the Federal Government to this administratrix can be upheld, except upon the authority of the 1920 Transportation Act and its terms and provisions must apply.

Third Question

As already noted, there was a failure on the part of the plaintiff to bring about a substitution of any Federal Agent for the Director General of Railroads, who was originally sued, until more that two years elapsed from and after the enactment of the 1920 Transportation Act and from and after the appointment and qualification of the first of the Federal Agents. Unquestionably, until the passage of what is known as the Winslow Statute, to which reference will be presently made, it was obligatory upon the plaintiff to bring about the substitution of a Federal Agent for the Director General within twelve months after the termina-

tion of Federal control of railroads. At the time all authority in the Director General of Railroads had ceased and all the functions of his office were carried forward into the functions of the office of the Federal Agent, who was authorized and required to wind up the affairs of the Federal administration of railroads. The Substitution Statute in force at the time the Winslow Act was enacted was a general statute requiring the substitution of a successor in office within twelve months after the death or expiration of the term of office or retirement or resignation or removal from office of a Federal official, if a cause of action against such officer was to be prosecuted. The Winslow Act was passed to cure the failure to substitute under this statute in so far as such failures came within the scope of its provisions. In order to be included within such scope, it was necessary that any action should have been "properly commenced within the period of limitations prescribed and pending at the time this subdivision takes effect." It is [fol. 137] here contended that this action was not properly commenced within the meaning of the Winslow Act and the benefits thereof could not be applied to this action for the reason that Mrs. Preston was not qualified as administratrix within the period of limitation prescribed and no suit was brought by any administratrix against either the Director General or the Federal Agent until after the two years had elapsed. Consequently, the failure of the Court of Civil Appeals to uphold the contentions presented in Appellant's brief to the effect that the Winslow Act would not apply and to the further effect that the said Substitution Statute did apply and did preclude any recovery amounts to an error of law of such importance to the jurisprudence of the state as that the Supreme Court of Texas should take jurisdiction and correct the same. If this be not done the Federal Courts will of necessity take jurisdiction if there be error, and this makes plain why the Supreme Court of Texas should grant the writ prayed for in order that litigation of this character may be expeditiously terminated without the necessity for further adjudication in the Federal Court.

(All of the foregoing matters were presented in the brief of Appellant and reiterated in the motion for a rehearing

regularly filed and overruled by the Court of Civil Appeals.)

First Assignment of Error

The Court of Civil Appeals erred to the prejudice of appellant in holding the evidence sufficient to take to the jury the issue of negligence of defendant in respect to the safety of the place of work, proximately causing the death of W. P. Preston, deceased, and hereupon in upholding the action of the trial court in refusing defendant's request for [fol. 138] a peremptory instruction.

Statement

The record shows that the defendant requested a peremptory instruction in writing and that the Court refused the same and noted his refusal thereon. The Court of Civil Appeals overruled the assignments or error presented in the brief attacking the sufficiency of the evidence to take to the jury the issue of negligence of the defendant proximately causing the death of the deceased. The nature of plaintiff's allegations of negligence appear in the opinion of the Court of Civil Appeals and without discussion it may be assumed that the verdict of the jury is in accordance with said allegations. It will be seen from the opinion that the jury found there was negligence on the part of the Director General of Railroads in leaving loose rails near the track, thereby causing Preston to stumble and fall.

It is here contended that the evidence is wholly insufficient to even raise an issue of negligence of the defendant proximately causing Preston's death. In this connection, we will outline material facts:

Plaintiff's decedent, W. P. Preston, met his death on the night of September 14, 1919. This was the same night that a severe gulf storm severely damaged the town of Corpus Christi, Texas. The effects of this storm were felt along the gulf coast as far north as Houston and Galveston. M. A. Moore, whose testimony was offered on direct by the plaintiff, testified in part, on cross-examination, to the effect that, on the night in question, he was working for the Houston Belt & Terminal Railway Company as engine foreman,

and that Preston was working under him as a member of his crew, which went on duty at 3 p. m. of that day and were to be on duty until 11 that night. Moore states that, on this particular occasion, when Preston was found dead, they [fol. 139] were taking Santa Fe passenger train No. 5, which was out of Chicago bound for Galveston, to the Houston Belt & Terminal Railway Company's coach yards in Houston. On account of the brewing storm, he states that orders had been given to hold up the train at Houston, and the passengers were, consequently, required to disembark and the empty cars had to be switched to said coach yard for cleaning and re-icing, to be held over night for the purpose of completing the journey to Galveston the next day. (S. F. p. 29.) In going from the Union Station with this string of cars on the night in question, the engine was pulling the cars just as the road engine would in handling the same. On the way out from the station to the coach yard, the witness Moore was riding in the fourth car from the engine, which was next to the last car of the train. Preston was riding with the witness in that car. The last time witness saw Preston before he died was at the door of the car on which they were riding. Witness states:

"As we sat in this chair car, we were sitting on the arms of the seat, which would make us face west, I think—I don't know the directions. When Preston got up to go, he went foward the engine, that would be in a sense south. When he got up to go, I went ahead of him; Preston got out first; we were talking to a friend, you see, that came down on that car that night, an engineer; he came down on that train, he was one of the crew and he was in the car with me and we were talking to him and we both got up and walked towards the door, I was in the lead and this engineer said something to me and withdrew my attention and I turned around and went back and Preston went on out; the door of the coach was closed after him; I did not see him any more after that coach door was closed, the next time I saw [fol. 140] him he was dead; I did not see him get off and I do not know which side he got off. Some one attracted my attention, I say, and that was the reason I turned back, he was teling something interesting." (S. F. p. 30.)

This witness further testified as follows:

"I did not see him get off and I did not see him fall and do not know how the accident occurred. He had on a rain coat that night. It was the night of the Corpus Christi blow, I told them that would be our last work, I wouldn't work no more; when we were going out I told them we would put that train in there and put up on account of the storm." (S. F. pp. 31-32.)

Moore also testified that the string of cars in question, help up on account of the existing storm, was to be put on what was known as the "short rip" track, which said track extended from Sampson Street, situated north of McKinney. (S. F. pp. 4, 81.) In mentioning the tracks that were situated in the vicinity of McKinney Avenue crossing, as viewed from the train moving outward from Union Station on this particular occasion, Moore stated that, on the left would be, first, the inbound main; then the "long rip"; then the "short rip"; then the run around." (S. F. p. 6.) Of course, the train itself was moving southward on the outbound main line, which movement was continued until the crossover switch was reached, and then the backward movement occurred, which placed the train on the "short rip" track, as was contemplated.

The witness Moore also states that there was a passenger car, which he terms "G. H. Car 7," situated on the "rip" track where they expected to place the string of passenger cars forming the train of Santa Fe No. 5. It was necessary, he states, after coming in to this rip track from the south [fol. 141] end thereof to couple onto this car situated on the south side of McKinney and shove it 30 feet beyond or to the north of McKinney and leave it on the north side thereof, so as to have room on the south side of McKinney for the five cars of the Santa Fe train. He states that the car in question which had to be shoved across McKinney and left was 80 feet long, and that in order to have clearance, there was 30 feet distance from the near end of the car between it and McKinney. Thus the long field man, which was the position that Preston occupied, in order to couple the moving string of cars into the standing car, would have to be approximately 110 feet from McKinney crossing at the time he undertook to make such coupling.

(S. F. p. 35.) The testimony in this connection is presented as bearing on the probability that Preston, knowing this was his duty, would have attempted to get off at McKinney crossing and then, in such weather, walk 110 feet further in order to reach the place where he could perform such duty. Moore says that it was shell all the way from McKinney down to where this coupling had to be made, consequently there was nothing suggesting the advisability of getting off at McKinney.

Beyond a doubt, the only fact, or circumstance, offered as suggesting that Preston may have stumbled against the rail in question, was an indentation in the shell ballast very near McKinney crossing, which was claimed to be the heel print of Preston made when attempting to alight from the car. The testimony on this will be presented later.

Preston was found dead about two blocks, or a little more that that, south of McKinney Avenue and near the Milby street crossing. Since Preston expected to couple into the [fol. 142] car No. 7, already mentioned, he had been told about it by Moore. (S. F. p. 8.) Moore missed him and had to do the coupling himself. He states that he made this coupling, and then walked around the standing car to a point near McKinney Avenue, when some one came up, bringing a hat, asking if it were not Preston's hat. It was then that Moore thought there was something wrong. (S. F. pp. 8-9.) Then someone else asked him if he had all his crew, and he replied, "No," that he was looking for Preston and received the further information that a man was dead near Melby street crossing. (S. F. p. 8.)

It appears that the Houston Belt & Terminal Railway Company maintained a coach yard near McKinney Avenue, and that switching crews had to make more or less frequent trips to this point with passenger equipment. Moore says that it was customary for the long field man, this being the position that Preston occupied, to get off near McKinney. This is also corroborated by the other witnesses, but none of them state this was such a custom as would be controlling under the peculiar facts in this case, where a car had to be moved as was this car No. 7, situated on the rip track in question.

D. E. Proper, a witness called by the defendant, testified that he was a civil engineer in the employ of Houston Belt & Terminal Railway Company, and that he had checked

measurements shown on a plat offered in evidence, as well as locations on the ground. We quote his testimony, in part, as follows:

"From the time that the track leaves the McKinney crossing it is going almost south, and after you leave McKinney going towards the Union Station it turns slightly to the west. There are five tracks that cross McKinney Avenue and there are four rip and coach storage tracks that stop. Beginning at the outbound main there are five tracks at 14 foot centers going east from the outbound main, and west [fol. 143] from the outbound main is one at 50 feet and one at 16 feet from that, and one at 13 feet and one at 16 again. The distance from rail to rail between the inner rails would be 9 feet 4 inches. The distance from near rail of inbound main to near rail of the first rip would be 45 feet 4 inches, and the distance from that rip to the next rip, rail to rail would be 11 feet four. The width of a standard railroad track rail to rail is four feet eight inches. The rail is approximately two feet five inches; that may vary an inch, perhaps, I would not want to say exactly whether it would or would not be more than an inch, but you look down on the train and see the coaches, there is not much more than an inch variation between any of the coaches, that is about it, 2 feet 5 inches.

"The width of McKinney from curb line to curb line is 30 feet. The full width is 50 feet; there is really no board walk across the street, but between the tracks it is 30 feet wide.

"This is Milby Street here, it does not parallel McKinney. Milby and McKinney intersect at a point southeast from the crossing. The distance from the intersection over McKinney along the tracks to the intersection over Milby is about 760 feet, that is, from the south curb line of McKinney to the south line of Milby. The arc light is on the south curb line of McKinney, and it is 25 feet from the center line of the farthest track to the east, which would make it approximately 67 feet from the center line of the outbound main line track. That arc light is, I should judge, about 25 or 30 feet up." (S. F. pp. 588-59.)

Now, returning to the testimony of Moore, we note as follows:

[fol. 144] "I did not find nothing that belonged to Preston; I saw his lantern, they had it over on the coach, I don't know who picked it up; they did not tell me where they picked that up, they said that it was Preston's lantern. I then made an examination of the ground there at the McKinney Street crossing, right up to the crossing between the two main line tracks. About here's the crossing—say about here (indicating) about two feet, a little further, then, say, two and a half feet—there was a heel print. As to whether it was heavy, of course, it was raining, the ground was soft and the heel sunk in the ground; it sunk in the ground about his heel, it looked to be fresh. Just about here the man got off (indicating). I found the print of the heel. There were some rails between those two tracks, they were steel rails. That footprint was fresh, it looked like a fresh heel print. That was about two feet from the end of a rail. There was one rail there. Rails were all the way down. There was only one there that I seen; I guess that was steel, they are supposed to be putting in 90-lb. steel. This heel print was about two and a half feet from the rail, from the end of the rail. The rail was lying the way the train was going. There were rails all the way clean out to the yard laid along in position to be joined up. There were not two rails, I just saw one. Some places way down there were two just laid to be—stretched out." (S. F. p. 10.) * * *

"I found a heel print there, but I could not swear it was Preston's. From looking at it, it looked like it had just been made. The rain falling that night would not have wiped out an impression that deep down, even though it had been made some time before, water going into the print, you know." (S. F. p. 11.) * * *

[fol. 145] "The foot print was parallel the rail, but it was about that far from the rail (indicating). The rail lying loose on the ground was more than one-fourth of a foot from the step of the coach that Preston got off. The loose rail was, I guess, about a foot or a foot and a quarter from the steps. As to how far a man in alighting from a coach steps put his foot as he alights, you have different rules. Every man does not light on the same foot; one will light on the right and some on the left; I can tell you how I light. Some light closer and some further; I could not tell you about that, it is just like any other business.

"I walked all the way up the main line to where we found the body to look for blood or other evidence, to locate where Preston might have first fallen or gotten under the train. Near McKinney, as evidence indicating that he had been caught there at the McKinney Street crossing, I saw little pieces of his underclothes and jumper. That was down about—probably a quarter of a block away from McKinney Street. There is 300 feet to a block. About 150 feet, I guess, from McKinney Street were the first signs I saw that he had been caught. I saw little pieces of his undershirt and jumpers, a blue shirt, it was. I never saw any blood. One blood stain a fellow showed me; that was just a little ways from where I saw this piece of cloth, half a car length towards Milby. I don't know where the lantern and hat were found, they were found on the main line somewhere. From there on to where the body was picked up I did not find anything. I will tell you I was the last one to see him. The body had not been moved when I saw him. Between the point where I first found the pieces of jumper and undershirt I never found anything. I never looked at the coach on which he was caught or struck, but I believe some of the men did. I walked on down from where we [fol. 146] found the jumper and undershirt to where the body was found, and I found nothing but pieces of shirt. I never found anything at Milby Street crossing, I never saw anything. I never found anything after finding the undershirt until I found his body." (S. F. pp. 11-13.)

"As to whether it is the custom of the switch yards to keep free from all obstacles to keep their men from tripping, I will say that it is not a yard, it is the main line. Where we do switch trains, where we get on and off, of course, it is regarded by switchmen as unsafe to leave anything like rails and other obstacles around; we don't want nothing in our way. Certainly it would trip a man if he got off a train and touched a rail, it would trip and throw him. As to whether I think that is the reason that Preston met his death in stepping off, will say I could not think nothing because I have two ways to think. I could not answer whether I think the most probable explanation of his death is that he stepped off, hit the rail, it tripped him and threw him under the train. He never worked all day long with a raincoat on, he had on a raincoat that trip. He

could have stepped off and hit the rail and tripped; he could have got his raincoat caught in the door, got his clothes caught, or anything like that; I did not know how it was." (S. F. pp. 14-15.)

Concerning the weather on the night in question, Moore testified as follows:

"At the immediate time Preston was killed it was drizzling, I think, wind and rain mixed up. The wind was blowing, I guess, about 35 miles an hour. Preston had a raincoat on, it was a long rain coat, I don't know what brand it was. It struck down below the knees, between the [fol. 147] knees and ankles (S. F. p. 3). * * *

"I recollect that night very well; the wind was from the left side of the car as I went out, it was coming up against the left side of that string of cars, I could not tell you what was the estimated velocity. (Witness testified by deposition it was about 35 miles an hour.) It was blowing a gale. On that same question I told them I didn't know how fast the wind was blowing, I figure about 30 or 35 miles an hour. (S. F. p. 34.) * * *

"I was asked by counsel whether or not a man being inside of a vestibuled platform could get down underneath so as to be run over. Such a man could, if he is standing on the steps and a very severe wind was blowing, a gale, he might somehow be caused to slip or fall and become entangled so as to be dragged under there; he could catch on; you know in all vestibuled cars they have got a little trap door; of course, that trap door could fall, you see, and could catch a raincoat or catch on anything, you know, and cause it; you see, the wind blowing, it might have blowed him; I wasn't there to see how it happened. The trap door could blow and catch his raincoat, and then he would drag underneath. Of course, he could, if he fell on the ground, if he wouldn't get to his feet again, he would have to go somewhere, wherever the track would hit him." (S. F. pp. 43-44.)

In further discussing the heel print Moore said:

"It has been quite a while, I had been down there, but I don't remember whether it was twice, I had been down there with the crew comparatively a short while before

thim; some of our men got off before that and one of them could have made this heel print getting off on that occasion if he had stepped off on that place. They would get off [fol. 148] ordinarily at McKinney Street crossing; this was right at where the watchman walked back and forth; they may step off on the crossing—walk across there—they have got coach repairers, you know, that go over there and walk over there, they have a track walker that walks the track. No, I am not trying to tell the jury that this was Preston's heel mark, I could not swear it was Preston's heel mark. I don't know how he got caught and carried on that train down to Milby Street." (S. F. p. 36.)

J. S. Cloud, called as a witness by the plaintiff, testified that he was a member of the switching crew on the night in question; that the last time he saw Preston was when Preston boarded the string of cars just prior to the movement out beyond McKinney. (S. F. p. 17.) Cloud states he does not know where Preston got off the train the night he was killed; that he (Cloud) was riding on the head end. He it was who lined up the switch for the movement from the main line track on to the rip track already mentioned. In this connection we quote a portion of his testimony verbatim:

"There was a freight crew on the track going in, with an engine ahead of the cars, and a flicker of the oil burner in the headlight, the oil burner beneath; there was a man riding the footboard by the name of Thompson, on the other crew, and the engine stopped, I don't know what it stopped for, it stopped quick as it could, and this man run back to where I was at the switch and asked me if we had all of our crew, and I told him I guess we had, and he asked wasn't it Preston working long field; he asked if I knew where Preston was, and he said this must be him, or looks like him, there is a dead man on the track. That was when I first learned Preston was killed. This fellow Thompson was talking to me, he was the switchman on the other crew. That was just south of Milby Street about fifteen or twenty [fol. 149] feet. At the time the man called my attention to it I was clear over the main line, on the left side going out, away from town, on the right of the south-bound main line, that is, the right, looking south; he was in the middle of the track. (S. F. p. 18.) * * *

"He was not under the train, he was in the middle of the track. There were no indications on the train as to which side he had been dragged on; we could tell nothing. At the Milby Street crossing there was indications on the rear trucks of the chair car beneath the rear trucks, that was the only thing; it was the last car; seems like it was general over the truck, over the brake rigging, as far as I could see. At the Milby Street crossing, if I am not mistaken, there were evidences there as to where he had truck the crossing, that is, which side. I never found any of the equipment, any clothes, hat or lantern, or anything like that, but from what I understand from men who did find his hat and lamp, it was on the left-hand side going out, as if he got off on the left side. That was the proper side really to get off; in fact, the only place he could have got off with safety at that time was McKinney Avenue, and when it is wet and slippery that asphalt is not safe, a man is liable to slip and fall; if he could have hit the shell on the left side would have been the safest, that is in order to strike a surface of shell. I could not see any indication at the McKinney Street crossing as to which side he was being dragged on in the way of blood or otherwise; there was nothing on the train on the left or right side, only what I have stated.

"I viewed the corpse at the undertaker's, and as near as I remember, the right arm was cut off, left leg cut off, he was twisted all out of shape, I suppose bones broken all over, I suppose he was killed instantly, his face was cut up. It seems to me the arm and left leg were cut off, either [fol. 150] left leg cut off and right arm broken, I don't remember which; I just taken two two or three looks, and did not look at him any further, because a man working where I am keeps his eyes off of anything like that, because it is liable to happen to him.

"I was with the rest of them when they went there and examined for any signs at the McKinney Street crossing; we all walked there to see which side he got off, and looked at the foot print; I could not swear to it from what I saw, but my opinion—what I mean is nobody could, at least I could not, swear to what side he got off. We found what looked like a foot print in the shall there, but, of course, it was raining pretty hard, and we could not tell whether it was an old or new foot print. Seems like it was a heel

print, as near as I could discern. I would not venture to say how far that was from the end of the loose rails between the two main line tracks, but it seems about a step or step and a half, possibly two; I don't know exactly what distance it was. As near as I can remember, the end of the loose rails from the McKinney Street crossing was possibly between eight and ten feet, something like that; a man can't swear without measuring. The loose rails were scattered out there to be relaid. I suppose there must have been two rails, at least it looked like two rails, laid all along each track to be relaid. Beginning at McKinney Street crossing I don't know exactly how far they extended south, because we do not work any further south than that cut-off. They were laid down as far as Milby Street. I could not swear how close in between the two main lines the two rails were together at McKinney Avenue; they were something like a few inches, possibly a foot, ten or twelve inches apart, as near as I can remember.

"It seems to me like the man found his lantern on that [fol. 151] side of the inbound main line, that is, clear of the two tracks, I could not say exactly how far from the McKinney Street crossing, they found his lamp just opposite the crossing. I think, according to what I heard, his hat was found somewhere in the neighborhood of the main line, on the left-hand side. We did not find any evidences along there close to McKinney Street crossing showing he had been caught there by the train, nothing but his hat and lamp. According to my inspection next day, I found bits of clothing, pieces of cloth that matched his jumper, down about midway between McKinney Avenue and Milby Street, or maybe a little further. We did not see any clothing on the train; I looked on the train. He had on a slicker, that was torn all to pieces. I could not tell whether it was torn any one place more than another. His clothing was all torn off of him. He had been dragged somewhere from McKinney or Milby, according to the best of my knowledge, from the looks of the body. (S. F. pp. 18, 17a, 18a, 19.) * * *

"Nobody was a witness, an eye-witness; we could not say what was possible; that night we just discussed what could have happened. We said it could have happened by him stepping off and hitting those rails; there are a half dozen ways it could have happened. We did discuss that it might have happened that way, at least several of us

made the remark that it could have happened that way, he could have stepped off and hit the rail and fell, or could have stepped off and got his clothing caught or could have stepped off and slipped and gone under the wheels. There are a half dozen ways it could have happened; you don't know how many ways a man can be hurt by a railroad until you get hurt about fifteen times. It was just like I say, we did discuss that theory; in other words, we could not swear to nothing, because we did not see him. The fact of the [fol. 152] case is, nobody could swear what side he got off, as far as that is concerned, because we don't know. It was dark and rainy." (S. F. p. 20.)

A. H. McDaniels, called as a witness in behalf of the plaintiff, testified that he was a member of the switching crew on the night in question. We quote his testimony, in part, as follows:

"In going out, I was next to the rear coach. Preston was in the same coach with me. I first learned he had been killed when we crossed over to shove into the rip track. The foreman who rode the hind end did not see anyone there, and thought he was ahead; we passed the signal and when the engineer shoved in Moore come and says, 'Where is Preston?' and I told him the last time I seen him he went out to get off at McKinney; we then begun to look for him, one of the car men in the yard, coach yard, picked up his hat and asked if that wasn't his hat. We had already backed down to McKinney. The watchman at the switch yard brought the hat. I did not see him pick it up; he brought it to us over across the main line; he came from the main line clear across the track, he saw us over on the rip track. I never noticed him come from the main line track until he walked right up with the hat. We had not found the body then. Somebody found the lantern then, I believe Moore found it; I saw him pick it up; it was on the left-hand side plum across the inbound main line, that is, over towards the rip track, I judge it would be about 14 feet over there from the Main line, and about ten or fifteen feet, I suppose, from the McKinney Street crossing. I knew that was Preston's lantern. I began to look under the cars on the rip track. I did not find anything, but afterwards I think some of the crew found

pieces of clothes and flesh hanging to the rear car. I never went down there to the body; I went only down to where the engine was. I did not go beyond the middle of the [fol. 153] street that night until the body was picked up. I examined along the tracks for signs. I walked from where McKinney Avenue was to where the engine was; one of his shoes I found along the main line about widway betweeen McKinney and Milby. I did not find any marks at all showing evidence that he had or had not been dragged. I saw a foot print with the others there that night close to the McKinney Street crossing on the lefthand side of the track, I judge, possibly three or four feet from the McKinney Street crossing. There were two rails between the two tracks that night, they were between the two main line tracks. I don't know how far it would be from the line of the coach to where the rails were, but about the middle of the track, not over 18 inches of the outside. The end of the rail next to McKinney Avenue was, I suppose, about four feet from the McKinney Avenue crossing. We found what looked like, somewhat like, a heel print there in the shell; it seemed to be fresh. I don't know but it was about eighten or twenty inches, I guess, something like, from the end of those loose rails.

"There was no discussion between me and the other members of the crew and those that were present that night in reference to this track and his stepping on those rails, might have stepped on those rails; there was no discussion that I can remember. This footprint in the shell was in the usual and customary place for long field men to get off the train going down there; it was just about the right place to get off on a paved street there. On a night when it is raining you are more likely to get off on shell than you would be on boards or cement; it would be safer. I don't know how long those rails had been there in that place, but they had been there quite a while.

[fol. 154] "I did not examine the body; I did not see it at the morgue or examine it that night. The next day when I went down there I looked there at Milby Street crossing for signs where the body had been dragged. The only thing I found was pieces of clothes and little pieces of flesh on the crossing boards, at Milby; they were in the middle of the track on the north side of Milby. I found pieces of flesh, etc., there. It was in the middle of the track of the

outbound main line. It tended to show that the body caught there on the crossing and probably mangled more or worse, there, because if he was caught underneath, the brake rigging would just about clear him until he hit the crossing; boards struck him, I guess, and tore him loose'' (S. F. pp. 22-24).

J. B. QUARLES, sworn in behalf of the defendant, testified, in part, as follows:

''My name is J. B. Quarles; I live in Houston. I am a city fireman. I have been in the railroad service for seven years, at one time working on the Houston Belt & Terminal Railroad. I just knew W. B. Preston when I seen him, I did not know him personally. I was not a member of the same crew with Preston the night he met his death, I was a car man; I was in the vicinity, however, the night he met his death. The first thing that attracted my attention to the fact that there was something wrong out there was when I found his hat. Shortly before I found this man's hat I had come down from the Union Station to the coach yard in this Santa Fe 5 equipment and had gotten over where they stopped it and started across to the shanty over there where they stay, and I picked up his hat. The carmen's shanty is back on the west side of the tracks, there, of the coach yard, it is further back than the switchman's coach yard, it is further back than the switchman's shanty, further on the other side. On that occasion I got off on the [fol. 155] west side of the train; that is the side the shanty was on, and I started to cross the track to the shanty. When I picked up the hat I was not thinking about anything, you know, I just thought his hat had blowed off, and I am not clear on just where I found the hat, unless it was between the tracks of the inbound main; that is the best I can recall. I got off on the right-hand side. The train pulled down and backed in, you know, and backed into the track and I got off then, which would be the right-hand side facing the train. I got off after the train had come to a stop on the rip track. It was stopped with the usual clearance from the crossing at McKinney, and that was something like thirty feet or more. I was riding on the rear car, I got off of the rear end; I walked towards McKinney Avenue, right towards the watchman's shanty; it was in going

there I picked up this man's hat; the best I can recall it was between the inbound main.

"I was present when his lantern was picked up. The best I can recall, that was between the inbound main and the long rip, we call it there, the next track over.

"My attention was called to a mark in the shell near the McKinney crossing, and also between the two main lines. That mark looked something like the print of a man's heel, but I could not say that it was, it was not a perfect print of a heel, but it looked something like a heel, but I could not state for certain whether it was; I would not undertake to swear it was a heel. I judge it was something like six or eight feet from the board walk across McKinney, but I did not measure; it was somewhere between the tracks there, I judge it would be three or four feet from the east rail of the outbound main.

"There were rails lying between the two main lines. This mark was something like two or three feet, the best I can [fol. 156] remember, from the end of the nearest rail." (S. F. pp. 49-51.) * * *

"I am quite familiar with all the trackage out there. If I were sitting in the train facing the engine going out, as I was that night in that train, the inbound Santa Fe would be on my left going out; it would be on my left as I was leaving the Santa Fe station; then there would be the long rip, the short rip and the inbound Santa Fe main to my left as I went out, crossing McKinney Street. (S. F. p. 51).

"* * * It is my understanding that that Santa Fe train had been stopped here that night and diverted from the trip to Galveston on account of the storm." * * * (S. F. pp. 51-52.)

T. C. Morris, sworn as a witness for the defendant, testified as follows:

"My name is T. C. Morris, I live in Houston; I am now employed by the Houston Belt & Terminal Railway Company as a crossing flagman. My present station when I am on duty is at Odin and Mary Streets, in the Fifth Ward. I have been a flagman at the McKinney crossing. (S. F. p. 52.) * * *

"I don't remember the young fellow's name that first advised me of this man's death, he found the hat in the

first place, he fetched the hat around and said one of the switchmen had lost their hat, and I says, 'Let me have it and when they come around I will give it to him and he can get it back again', so he had to come around on the west side of the main line on the rip tracks there, and he forgot something on the east rip track and went back for it, so he asked me for the hat and took it back to Mr. McDaniels, I think it was, gave him the hat, and they got to looking around, and found the lantern. I saw this young fellow pick up the hat, it was off east of the main line, and I think between the long rip track and the short. I was speaking of the hat; it was not between the main line and the rip, it was just over the first rip track. To be truthful with you, I don't know which one of the rip tracks the Santa Fe train [fol. 157] had been placed on. I was standing out in front of my shack on McKinney and I don't know exactly how far the hat was at the time this man picked it up directly to the McKinney crossing, that is, the board walk. I noticed when he picked the hat up he spoke, and he says, 'One of the switchmen has lost their hat.' He fetched it over and gave it to me, and the hat was wet and heavy. This was not found after they had placed the cars that they brought out there; they was backing up when this fellow found the hat, whatever his name was, that worked on the car, and he happened to be coming up there and picked up the hat just across the first rip track, I mean just across the first rip track from the main line, in other words, going from the incoming main line. Going from the incoming main line towards the east, you would cross the first rip track, and then come to the point where the hat was found. The track runs parallel, we will say, that this represents the inbound main line coming towards town, now then, the rip track would be over here to the east, and the hat was found beyond this rip track over to the east.

"I saw the lantern picked up, also; I was with him at the time that was picked up, it was still beyond this, laying up near the rails, between the ties of this same track that the hat was on, the same rip track.

"My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two main line tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh, and we

supposed it to be the heel mark where he lit; that was the supposition. (S. F. pp. 53-55.) * * *

"I was supposed to go on duty at 10 o'clock; I usually aimed to get there all the way from a quarter to a half hour ahead of time. As quick as I go on duty, the man [fol. 158] I relieve, I take his place. I could not tell exactly just what time I went on duty, but it was somewheres near 10 o'clock. Directly after I went to work the train came down. It was usual for the end man to get off there. I could not say there was any peculiarity about that heel mark that would have prevented it from being made by someone else; the only thing about the track was it looked fresh; I probably wouldn't know the difference between that and one made a half hour before; I don't suppose I could define any difference between such a mark and one made an hour before.

"That was the night of the storm, the wind was blowing; I declare I could not tell you how strong the wind was, but it was blowing mighty hard. I had reason to notice the violence of the wind. When those coaches usually go by me, it didn't seem like there was much wind, but when the train passed me and the wind came against me, I had to jump to keep from going over. When the train was going by me it was a protection to me from the wind, and when the train cleared I felt the wind especially strong. I had a slicker on myself, and I had to jump around to keep from falling over. (S. F. pp. 55-56.) * * *

"My opinion is that when this train went by that night and this wind was blowing, it would pretty near upset a man like you or me or any other man. If I were not expecting it, being on the sheltered side of the train, then when it suddenly went by, I certainly would feel it. If I were on the other side of the train and following the wind, I don't know whether it would overbalance me that way. At that time we all know that storm, it seemed like it come in gusts. I haven't the least idea how Preston's hat got [fol. 159] where it was. I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and

lantern was farther over to the left, but just about the same distance from McKinney Street. The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street." (S. F. 56-57.)

Authorities and Remarks

Since the briefs filed in the Court of Civil Appeals present the authorities and the argument relative to this question, it is deemed to be unnecessary duplication to repeat here what has been said there. Consequently, your petitioner respectfully requests the Court to read the argument contained in the brief beginning on page 52 to the heading "Conclusion" on page 70. In response to matters argued by appellee, we filed a supplemental argument in the Court of Civil Appeals dealing mainly with one aspect of the question,—whether or not the case should have gone to the jury. In other words, we discussed in that connection the application of the doctrine that one presumption can not be built upon another presumption. It cited authorities in support of this position. This also we respectfully urge the Court to read and to consider.

[fol. 160] It seems so clear that there was no sufficient evidence to take to the jury the issues which were submitted by the court and upon which the judgment in this case is predicated that certainly the Supreme Court of Texas will not require the Government to pay out on account of this unfortunate occurrence any damages whatsoever.

Second Assignment of Error

The Court of Civil Appeals erred to the prejudice of appellant in holding that the cause of action asserted, and upon which the recovery was had, was not as a matter of law barred by the two year statute of limitations prescribed in the 1920 Transportation Act.

Statement

The record shows that this suit was filed against the Director General of Railroads prior to the termination of

Federal control of railroads. Federal control terminated on March 1, 1920. A Federal Agent was appointed on March 11, 1920. The motion to substitute the Federal Agent for the Director General was filed by the plaintiff, suing in her individual capacity and not as administratrix, on May 31, 1922. During that interim Walker D. Hines resigned and John Barton Payne was appointed successor as Federal Agent and he in turn resigned and James C. Davis was appointed. This occurred on March 26, 1921, or more than one year after the appointment of John Barton Payne, and it appears that the motion for substitution was filed more than two years after the termination of Federal control and after the appointment of the first Federal Agent.

The record also shows that the appointment and qualification of Mrs. Preston as administratrix of the estate of her deceased husband occurred during the course of the trial of this law suit and after all the evidence was heard and the Court was undertaking to prepare his charge to [fol. 161] the jury. This action was taken when the attorneys realized that the terms and provisions of the Federal Employers' Liability Act required the suit to be filed by an administratrix and not otherwise. Up to that time no pleading had of course been filed in behalf of an administratrix against any defendant in this cause and no administratrix had ever requested the substitution of a Federal Agent for the Director General.

The 1920 Transportation Act contains the following provisions:

"Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes, but not

later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier." * * *

"Final judgments, decrees and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a) shall be promptly paid out of the revolving fund created by Section 210." * * *

"There is hereby appropriated out of any moneys in the treasury not otherwise appropriated the sum of $300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying the judgment, decrees and awards referred to in subdivision (e) of Section 206." (Transportation Act, 1920, pp. 116, 118, 128.)

In respect to actions pending as against the Director General at the time of the termination of Federal control, the statute provides, as follows:

[fol. 162] "Actions, suits, proceedings and reparation claims, of the character above described, pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)." (Transportation Act, 1920, p. 118.)

Third Assignment of Error

The Court of Civil Appeals erred to the prejudice of appellant in holding that the cause of action upon which recovery was had was not barred as a matter of law by the One Year Statute of Limitations prescribing the time within which the substitution of Federal officials could be accomplished and causes of action against the successor officials prosecuted, and thereupon in holding that the trial court properly refused defendant's request for a peremptory instruction.

Statement

In addition to what has been mentioned in connection with the preceding assignment of error, we call attention

to the provisions of Article 1594 of the United States Compiled Statutes:

"No suit, action or other proceeding lawfully commenced by or against the head of any department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or reignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs." (U. S. Comp. Stat., 1916, Sec. 1594.)

This statute has been applied by the United States Supreme Court to the matter of substituting a Federal Agent for the Director General of Railroads and for a predecessor Federal Agent.

[fol. 163] On account of the effect of this statute thus construed, Congress passed what is known as the Winslow Act, which contains the following provisions:

"Actions, suits, proceedings and reparation claims, of the character described in subdivision (a), (c) or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under the subdivision (a) but may (despite the provisions of the act entitled 'An Act to prevent the abatement of certain action,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office."

It is of course a prerequisite to the application of this last quoted statute that the action in question should have been "properly commenced within the period of limitation prescribed." If this prerequisite is found not to have

been met, necessarily the statute could not apply, nor could its benefit be taken. We submit that this is the situation in which appellee finds herself in this case. She sued the Director General of Railroads but brought the suit individually and not as administratrix. The Federal control of railroads terminated and no substitution was had and no administratrix was qualified until more than two years thereafter; indeed more than two years had elapsed from and after the appointment and qualification of the first Federal Agent before any steps were taken to procure a substitution of such Federal Agent and it was in the course of the trial of this law suit that an administratrix was appointed and qualified; in consequence of which the suit was not "properly commenced" within the period of limitation prescribed in the 1920 Transportation Act.

Authorities and Remarks

We wish to discuss the two year statute of limitations under the 1920 Transportation Act and the one year statute prescribing the time within which substitution of Federal [fol. 164] officials may be made and the application of these two statutes to this case.

It has been settled by decisions too numerous to mention that a suit against the Federal Agent under the authority of the 1920 Transportation Act is in reality a suit against the United States Government. An important principal to remember in this connection is well stated by Chief Justice Stayton of the Supreme Court of Texas in Texas-Mexican Railway Company v. Jarvis, 80 Texas 463:

"That a State can not be sued by a private person without its consent is well settled, and when such consent is given and a limitation placed on the right to bring such an action and upon the power of the court to hear and determine it, if that limitation be one of time, then the jurisdiction of the court ceases when that time has elapsed."

To the same effect we find the decision of the United States Supreme Court in Norris v. Crocker, 13 How. 429; 14 L. Ed. 210. We also call attention to the language used in Merchants' Insurance Company v. Ritchie, 72 U. S. 541; 5 Wall. 540:

"It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction."

We also ask the court to note the language used by the United States Supreme Court in Ex Parte McCardle, 7 Wall. 264, etc. The following is especially appropriate.

"On the other hand, the general rule, supported by the best elementary writers (Dwarris, Stat., 538) is, that 'when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.' And the effect of repealing Acts upon suits under Acts repealed, has been determined by the adjudications of this court. The subject was fully considered in Norris v. Crocker, 13 How., 429, and more recently in Ins. Co. v. Ritchie, 5 Wall., 541 (72 U. S. XVIII, 540). In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the Act under which it was brought and prosecuted.

[fol. 165] "It is quite clear, therefore, that this court can not proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

We also quote form the United States Supreme Court in the case of Joseph Beers v. The State of Arkansas, 61 U. S. 991; 20th How. 529, as follows:

"It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

It is clear enough, from the quoted provisions of the Transportation Act of 1920, that the previously given con-

sent for the Federal Government to be sued through such agency as the President might direct, during Federal control of Railroads, had been withdrawn. Of course, it is a matter of judicial knowledge that the President created the office of Director General of Railroads and that the Director General was by official bulletin designated as the proper agent through whom suits against the carriers under Federal control should be prosecuted. When Federal control terminated, however, as the result of Congressional enactment, all jurisdiction in any court whatsoever to render a judgment against the Director General as such, effective against the United States Government, was finally terminated. Provision was made, however, for prosecuting causes of action arising during the period of Federal control and the position of Federal Agent was created. Against this Federal Agent it was provided that certain suits, actions, proceedings, etc., might be prosecuted. In [fol. 166] this manner the Federal Government signified its consent to be sued upon such causes of action, after the termination of Federal control, and jurisdiction was thereby created and vested in appropriately designated courts to try and determine any and all such matters. By this same statute a special fund was appropriated out of which to pay judgments rendered against the Federal Agent under this jurisdiction.

It is therefore needless to argue that any litigant, expecting to prosecute an action against the Federal Agent, would be under the necessity of complying with the conditions and restrictions appearing in the 1920 Transportation Act affecting such matters. Concerning actions filed after the termination of Federal Control, it is clearly provided that the same would have to be filed within the periods of limitations prescribed by State or Federal Statute, and, in any event, not later than two years from the date of the passage of the Transportation Act. In light of sub-paragraph (d) of Section 206 of said Act it is also clear that for any court to have jurisdiction to render a judgment upon such an action, suit or proceeding pending at the termination of Federal Control, the agent designated by the President would have to be substituted in lieu of the Director General of Railroads.

In dealing with this question of the two year limitation arising under the 1920 Transportation Act, of course, the

adverse contention will arise that the pendency of the suit as against the Director General was sufficient to effectually prevent the running of the statute. This contention will be based, no doubt, upon those decisions of the United States Supreme Court to the effect that a new cause of action is not presented when a plaintiff, originally suing in her individual right, amends her pleadings and appears as administratrix to prosecute the action, there being no other change in the nature of the suit. This argument might find some support in a different case, where a juris- [fol. 167] dictional question was not also involved. In our case, as we have seen, after the termination of Federal control, all jurisdiction to proceed with the cause of action in its then form had been divested, and, to all intents and purposes, the cause then stood as though it had not been filed, except for the one possibility of substitution in conformity with the 1920 Transportation Act. But is is sufficiently clear to render argument unnecessary, that the jurisdiction would not again attach until this substitution occurred, and if the full period of limitation elapsed without such substitution, certainly it is reasonable to say that the action was barred. This finds support in the early case of Littlefield v. Fry, 39 Tex. 299, et seq. We quote briefly from this opinion:

"The original petition was wanting in averment necessary to give the court jurisdiction. It necessarily fell before the demurrer. As the court had no jurisdiction of the cause in its original form, and the defendant dies before the petition was amended, the amendment can only be regarded as the commencement of the suit as to administratrix. The cause really stands as a suit against the administratrix on a claim against the estate not proven up and presented to her in accordance with the probate law. It can not, therefore, be maintained.

"The court may certainly permit an amendment on payment of all costs, where the original petition sets out no cause of action, or where it fails to show jurisdiction, but such amendment, is in the nature of a new suit, and in no case will such amendment be allowed to relate back to the time of the filing of the original suit. It must relate only to the time of the filing of the amendment. (Citing) Hen-

derson v. Kissam, 8 Tex. 446; Williams v. Randon, 10 Ten. 74."

The case of United States, et al. v. Juan B. Martinez, Administrator, 195 U. S. 469, et seq., 49 L. Ed. 282, et seq, deals with the Act of 1891, providing for a recovery against the government and Indian tribes on account of depredations by such tribes. The Supreme Court held in this case that a petition setting up a cause of action against the government and the Kiowa Indians was affected by the three-[fol. 168] year Statute of Limitation. This holding was based upon the consideration that the wrong was originally alleged to have been committed by a particular Indian tribe and that it could not be amended after the three-year limitation prescribed by the act had expired by naming another and different tribe as the wrong-doer. The opinion says it was manifestly intended by the Statute, taken as a whole, that the tribe by whom the depredation was committed should be joined in the petition so as that it could be identified, though it did not provide for service upon such tribe. The amendment was held to be too late in specifying the correct tribe which caused the depredation, notwithstanding the fact that judgment was to run against the government and it had been sued originally. The ultimate effect of the decision seems to be that the cause was not in such shape as that it could properly proceed to judgment in the manner contemplated by the statute with the depredators proper- identified, until the amendment; and since the amendment was necessary in order to supply the essential allegations as to which tribe it was, it could not relate back to the original pleading.

We submit that, in like fashion, here, since the cause of action could not be further litigated, after the termination of Federal control, without the substitution of the agent appointed by the President, the Statutes of Limitation commenced to run from and after the date of the extinguishment of the jurisdiction by the termination of Federal control.

From Ruling Case Law, Vol. 17, p. 824, par. 187, we quote as follows:

"It is a general rule where an amendment is made by which new parties defendant are introduced, that if between the time of the commencement of the suit and the time when they are brought in, the period of limitation has expired, they may plead the statute in bar of their liability, although the defense might not have been available to the original defendant."

[Folio 169 missing.]

[fol. 170] of action that had not yet accrued. Yet, at all times, she had the discretion to bring about the accrual of the cause of action which she finally asserted as administratrix. We must assume that, prior to the substitution of the Federal Agent, the court was without jurisdiction to render any judgment against him. It was certainly without jurisdiction to render a judgment against the Federal Agent upon a cause of action which had not accrued. Assuming the correctness of the proposition that the cause of action accrued only from and after the appointment and qualification of Mrs. Preston as administratrix, we find that it actually accrued November 28, 1922. (S. F. page 62.)

This brings us to consider again the terms and provisions of the Transportation Act of 1920. This statute requires that actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the Railroads of the country, must be brought, if at all, within two years after the passage of the act. This statute does not provide for a *y*wo-year limitation from and after the accrual of the cause of action. The limitation provided here is a period of time computed from the passage of the Transportation Act of 1920, and this period of time had elapsed, according to the theory we are now discussing, prior to the time the cause of action accrued. The apparent absurdity in this situation is relieved under the supposition that Congress well knew that persons in the attitude of Mrs. Preston in this case could exercise their discretion to qualify as administratrices and initiate their actions as such within the two years prescribed. In other words, it might have been definitely in the minds of Congress, if this matter came under consideration at all, to be rid of

the possibility that a prospective plaintiff would temporize [fol. 171] with the situation indefinitely and select such time as might be most favorable, but probably unfavorable to the Director General and his successors, for the purpose of initiating the action.

Again referring to the effect of the decision of the Supreme Court of Texas in the Bird case, which we have quoted above, it is interesting to note that the very question there decided has not been up to the United States Supreme Court. The Corona, case, the opinion in which is referred to and approved by the opinion in the Bird case, reflects the view of one of the intermediate appellate courts of the United States. As matters stand, unless the Supreme Court of Texas now wishes to overrule its own decision on this subject, the only holding that can properly be made is to the effect that the cause of action did not accrue until Mrs. Preston qualified as administratrix. But, in this same connection, your honors would be under the necessity of applying the 1920 Transportation Act, and the two-year period of limitation therein prescribed, which said period runs from and after the date said law became effective.

We now come to the application and effect of the one year substitution statute. We have already quoted it above. It required that substitution be accomplished within twelve months after the retirement of the predecessor Federal Agent or of the Director General. Of course this was not done and except for the passage of the Winslow Act appellee's case would be hopeless. This act is submitted as a saving enactment made applicable retroactively by Congress after the cause was appealed. But we have already discussed the real prerequisite for the application of this statute,—that is that the suit must be "properly commenced within the period of limitation prescribed" in the 1920 Transportation Act. We have already analyzed the considerations which go to determine whether or not the suit was "properly commenced" within the meaning of [fols. 172 & 173] said statute. There was no administratrix and it would be difficult to argue that a suit was "properly commenced" when in order that it might proceed to judg-

ment at all it was necessary that it be re-commenced by introducing an entirely different party plaintiff.

Conclusion

It is respectfully urged that for the several reasons above mentioned the trial court should have given a peremptory instruction in favor of the defendant and that error has been made manifest in the foregoing application. Accordingly your petitioner prays that the writ issue.

Respectfully submitted.

Andrews, Streetman, Logue & Mobley, Attorneys for James C. Davis, Federal Agent.

[File endorsement omitted.]

[fol. 174] In Supreme Court of Texas

[Title omitted]

Order Granting Writ of Error—Nov. 5, 1924

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the 9th District, and the same having been duly considered, it is ordered that the application be granted and the writ of error issue as prayed for.

In Supreme Court of Texas

No. 4240

James C. Davis, Federal Agent,

vs.

Mrs. Mary Preston, Admrx.

From Harris Co.

Opinion by Mr. Justice Greenwood

Judgment—March 27, 1929

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial

District and the original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of the Court that there was no error in the judgments of the Court of Civil Appeals and District Court, it is therefore considered, adjudged and ordered that the said judgments be in all things affirmed. That the plaintiff in error, James C. Davis, Federal Agent, and his surety, Fidelity & Deposit Company of Maryland, pay all costs in this behalf expended in this Court and the Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 175] IN SUPREME COURT OF TEXAS

[Title omitted]

OPINION—Filed Mch. 27, 1929

By this writ of error a reversal is sought of a judgment obtained by defendant in error Mrs. Mary Preston as administratrix of the estate of her deceased husband, W. P. Preston, against plaintiff in error, James C. Davis, as Federal Agent, designated by the President as the representative of the United States in suits arising from federal control of railroads.

Two grounds are urged for reversal: first, that the cause of action asserted by plaintiff in error was barred by the statutes of limitations of the United States; and second, that there is no evidence to warrant the finding that the death of defendant in error's husband was proximately caused by the negligence of the Director General.

This suit was filed on February 26, 1920, by defendant in error individually against Walker D. Hines, as Director General of Railroads, to recover damages resulting from the death of her husband on September 14, 1919. The original petition charged that the death of defendant in error's husband, W. P. Preston, was proximately caused by the negligence of the Director General in failing to exercise ordinary care to provide said Preston a reasonably safe place to work, in that the Director General had negligently

caused iron rails to be placed near the track at a point where said Preston was required to alight in performing his duties as switchman in such manner as to throw him [fol. 176] beneath the moving cars. Walked D. Hines having resigned as Director General, John Barton Payne was appointed his successor as Federal Agent. Later Payne resigned, and, on March 26, 1921, plaintiff in error James C. Davis was appointed his successor. On May 31, 1922, the trial court made an order substituting James C. Davis, in his capacity of Federal Agent, as defendant in lieu of the Director General. On November 29, 1922, defendant in error, as the duly qualified administratrix of the estate of W. P. Preston, was, by leave of court substituted as the plaintiff; and she adopted the pleadings previously filed by her individually, with an additional averment that the Director General was engaged in interstate commerce when W. P. Preston sustained the injury causing his death.

On findings to the effect that W. P. Preston's death was proximately caused by the negligence of the agents of the Director General, as plead by defendants in error, she recovered a judgment as administratrix against plaintiff in error, James C. Davis, Federal Agent, for $3,750.00 with interest and costs.

Plaintiff in error appears to concede that under the express terms of the Winslow Act, a suit of the character of that of defendant in error "properly commenced within the period of limitation prescribed and pending at the time" the Act takes effect, "shall not abate by reason of the * * * resignation of the Director General or the agent designated" as his successor, but that the plaintiff has the right to substitute the proper federal agent as defendant in lieu of the Director General at any time before satisfaction of final judgment in such suit.

Plaintiff in error's contention is clearly and succinctly summarized in his application for writ of error as follows:

"The Federal control of railroads terminated and no substitution was had and no administratrix was qualified until [fol. 177] more than two years thereafter; indeed more than two years had elapsed from and after the appointment and qualification of the first Federal Agent before any steps were taken to procure a substitution of such Federal Agent and it was in the course of the trial of this law suit

that an administratrix was appointed and qualified; in consequence of which the suit was not 'properly commenced' within the period of limitation prescribed in the 1920 Transportation Act."

We think the Supreme Court of the United States has given such construction to the Acts of Congress as forbids the holding that this suit was not "properly commenced" by Mrs. Preston against the Director General. At the time the suit was filed, the Director General was the prescribed party defendant. The defect in her petition was that she sued as an individual instead of as administratrix. She was the real party at interest—no matter by whom the suit was prosecuted. That this defect did not prevent her suit from being "properly commenced"—so far as tolling the statutes of limitations is concerned—was in effect declared in Reading Company v. Koons, 271 U. S. 62, 70 L. ed. 837, where it is said:

"This court has held that a suit brought by such persons in their individual capacity is not a nullity within the provisions of the act, and that if by amendment the plaintiff is properly described as executor or administrator of the decedent, even though the amendment is had after the expiration of the statutory period, the suit may be maintained and a recovery had under the statute. See Missouri, M. K. & T. R. Co. v. Wulf, supra (226 U. S. 570, 57 L. ed. 355; Ann. Cas. 1914B, 134). See Seaboard Air Line Co. v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1, and New York C. & H. R. R. Co. v. Kinney, 260 U. S. 340, 67 L. ed. 294, 43 Sup. Ct. Rep. 122."

The Texas Supreme Court had previously interpreted the opinions in the Wulf case and in the Renn case as requiring the holding that:

"An amendment which merely substitutes as plaintiff the personal representative of deceased instead of his dependents, or one which adds to the previous allegations of fact, not otherwise altered, the statement that deceased was injured while engaged in interstate commerce, does not introduce a new cause of action". Pope v. K. C. M. & O. R. Co. of Texas, 109 Texas 312.

[fol. 178] This action was commenced before it was barred under the terms of any statute of limitations by the filing of the original petition and the service of citation on the Director General. It was an action pending on February 29, 1920. Sec. 206 (d) of the Transportation Act of February 28, 1920, c. 91, declares that such an action shall not abate by reason of the termination of federal control but may be prosecuted to final judgment substituting the designated agent for the Director General. Therefore, the action of the court below in substituting the Federal Agent for the Director General proceeded in strict conformity to the terms of the then governing federal statute. The period of limitation fixed in sec. 206 (a) related to new suits or to the introduction of new causes of action and not to a pending suit without change in cause of action. Bagging Company v. R. R., 184 N. C. 73, DeWitt v. N. Y. Central R. Co., 196 N. Y. S. 873, 874, 206 App. Div. 638; Davis v. Hagan, 255 S. W. 485; Hill v. Davis, 257 S. W. 342; Kilgore v. Hines, 265 S. W. 744; Dougherty v. Payne, 291 Fed. 60, 61.

The decision in Davis v. Cohen & Company, 268 U. S. 642, cited by plaintiff in error, is predicated on the conclusion that the substitution of the designated agent as defendant for the railroad company was "the commencement of a new and independent proceeding"; while the basis of our decision is the conclusion announced in the Wulf case and re-affirmed in the Koons case that such an amendment as that presented in this case "introduced no new or different cause of action, nor did set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit". M. K. & T. Ry. v. Wulf, 226 U. S. 576.

After careful consideration, we approve the decision of the Court of Civil Appeals that there was evidence to support the finding of the jury that defendant's negligence [fol. 179] was the proximate cause of the death of W. P. Preston.

The evidence plainly supported the finding that the Director General by his agents was negligent in leaving a ninety pound iron rail about a foot and a quarter from the coach steps where it was apt to be encountered by a switchman in alighting from the train and walking beside the

track in the performance of his regular duties. With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combating a thirty-five miles an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body actually caught and mangled beneath the cars as they proceeded a short distance farther; there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied his administratrix on the issue of proximate cause. Kreigh v. Westinghouse & Company, 214 U. S. 249.

The vital question here, which is whether there is a total lack of evidence of contact of Preston's foot with the rail is not unlike that of whether there was a total lack of evidence that one Myers met his death through contact with a wire. The latter question was thus disposed of by the Supreme Court of the United States, viz:

"Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient [fol. 180] light in the entry or in the motor car. We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which when fairly considered might sustain the verdict." Myers v. Pittsburgh Coal Company, 233 U. S. 193.

There being direct evidence that defendant negligently left an obstruction in Preston's path, and there being direct and circumstantial evidence leading to the inference that he encountered the obstruction while discharging his duty and was thereby thrown to his death, the case is one where the jury drew a warranted inference from facts. No piling of presumption on presumption, as is forbidden, was required in order for the jury to find against plaintiff in error on the issue of proximate cause. N. Y. Central R. Company v. Gapinski, 249 Fed. 347.

Finding no error in the judgments of the District Court and of the Court of Civil Appeals, it is ordered that said judgments be affirmed.

Thos. B. Greenwood, Associate Justice.

Opinion delivered March 27, 1929.

[File endorsement omitted.]

[fols. 181-188] Motion for rehearing, covering eight pages, filed April 10, 1929, omitted from this print. It was denied and nothing more by order April 24, 1929.

[fol. 189] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 24, 1929

It is ordered by the court that the motion for rehearing herein by the plaintiff in error be overruled, as recommended by the Commission of Appeals.

IN SUPREME COURT OF TEXAS

[Title omitted]

PETITION FOR STAY OF MANDATE—Filed May 17, 1929

To any judge of the Supreme Court of Texas:

Now come James C. Davis, Federal Agent, and Fidelity and Deposit Company of Maryland, in the above styled

and numbered cause, hereinafter called petitioners, and respectfully petition that the execution and enforcement of the mandate and judgment in this case be stayed for a period of time to be fixed by your Honor, to enable your petitioners, the parties aggrieved, and each of them to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, and in which to obtain all relief to which they may be entitled in that regard.

[fol. 190] Wherefore petitioners pray that they have a stay of the mandate and of the execution and enforcement of the judgment herein, for a period of time to be fixed by your Honors, and until the Supreme Court of the United States has finally acted, and further they pray for all such relief as may be their due.

Very respectfully, James C. Davis, Federal Agent, Fidelity and Deposit Company of Maryland, by Andrews, Streetman, Logue & Mobley and W. L. Cook, Their Attorneys of Record.

[File endorsement omitted.]

[fol. 191] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER TO STAY MANDATE—Filed May 17, 1929

On this day there was presented to the Court, the petition of the Plaintiff in Error, and of its surety on its supersedeas bond, Fidelity and Deposit Company of Maryland, in the above case, praying a stay of the mandate out of this Court to the District Court of Harris County, Texas, 80th Judicial District, or to the Court of Civil Appeals for the First Supreme Judicial District of Texas, this Court having affirmed the judgments of those courts; and it being made to appear to the Court that the plaintiff in error and its said surety in good faith are prosecuting their application to the Supreme Court of the United States or will apply thereto for a writ of certiorari.

It is now ordered that the Clerk of this Court do not issue any mandate in this case until the further order of

this court and that the proceedings for writ of certiorari be completed within 70 days, then that no mandate shall issue until the case shall have been disposed of by the Supreme Court of the United States.

C. M. Cureton, Chief Justice of the Supreme Court of Texas.

[File endorsement omitted.]

[fols. 192-195] Bond on certiorari for $10,000.00, approved and filed May 17, 1929, omitted in printing.

[fol. 196] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court
FILED
JUN 22
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 188

JAMES C. DAVIS, Federal Agent, et al., Petitioners,

vs.

Mrs. MARY PRESTON, Administratrix.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

SIDNEY F. ANDREWS,
W. L. COOK,
Counsel for Petitioner.

(34,319)

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SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 188

JAMES C. DAVIS, FEDERAL AGENT, ET AL., PETITIONERS,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Federal Agent designated by the President of the United States to wind up the affairs of the United States Railroad Administration and Fidelity & Deposit Company of Maryland, surety on the appeal bond, respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The Petitioners are the Federal Agent appointed by the President of the United States to wind up the affairs of the United States Railroad Administration

and his surety on the appeal bond, Fidelity & Deposit Company of Maryland. At the time of the trial, the Federal Agent was James C. Davis. Notwithstanding his retirement, and because the judgment stands against him in his official capacity, the cause is presented in his name. It is claimed adversely that the Act of March 3, 1923, 42 Stat. L., 1443, has full application, relieving the case of all embarrassment concerning the necessity of substituting the successor Federal Agent. This contention, however, gives rise to one of the important questions presented.

The Respondent is Mrs. Mary Preston, Administratrix of the estate of her deceased husband, W. P. Preston.

The action as finally carried to judgment was under and pursuant to the provisions of the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 149; Comp. Sections 8657-8665), to recover damages for the benefit of Mrs. Preston as the surviving widow of the deceased. The employer of W. P. Preston at the time he met his death was the Director General of Railroads, operating the properties of Houston Belt & Terminal Railway Company under the authority of Congress. Preston met his death in a switch yard in Houston, Harris County, Texas, on September 15, 1919, his death having been caused by his being run over and crushed and dragged beneath a certain car or cars engaged in interstate commerce and being handled by Preston and others of his switching crew in furtherance of such commerce. The petition (R., 2 *et seq.*; Amended R., 12) did not set forth the

fact that Preston was engaged in interstate commerce, but it came out in the evidence on the trial and with leave of the Court after all parties had rested, a trial amendment was filed, whereby Mrs. Preston as Administratrix appeared in the cause, setting forth that the deceased was engaged in interstate commerce, and asking for recovery accordingly (R., 20).

The essence of the cause of action is "that defendant, his agents, servants and employees, had placed immediately adjacent to the track on which said cars were being switched, a number of steel rails and so close to the said track that when said W. P. Preston, in getting off of the moving cars at the McKinney Street crossing, without knowing that said rails were there, stepped on and among the same, which caused him to trip or slip, thereby throwing him under said moving cars, causing his immediate death." Upon these allegations further averments of negligence of the employer in failing to provide a safe place to work and in failing to warn Preston concerning the rails and obstructions were set forth in the petition (R., 14).

Suit was filed on February 26, 1920, against "Walker D. Hines, Director General of Railroads" (R., 2). The suit remained inactive until May 31, 1922, when Mrs. Preston, suing individually and not as Administratrix, filed and presented a motion for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This motion was opposed because of the lapse of time and on two grounds specifically, that the Act of February 8, 1899, prevented the substitution after lapse of one year, and

that, in any event, this substitution could not, under the circumstances, be accomplished after the lapse of two years subsequent to the termination of Federal control (R., 8-9). The motion was, however, granted on May 31, 1922 (R., 10). The same grounds as were presented in objection to the substitution were again brought to the attention of the Court by the defendant, James C. Davis, Federal Agent, through the medium of a plea in abatement, filed November 5, 1922, but this was overruled (R., 10-11).

In addition to the foregoing, James C. Davis answering in the cause, presented a general demurrer and general denial and pleas of limitation arising, not only under the Federal Employers' Liability Act, but also under the Transportation Act of 1920 (R., 15 *et seq.*).

After the parties had rested, plaintiff's attorneys discovered their oversight in not having qualified Mrs. Preston as administratrix and in not having her intervene in that capacity in light of the controlling effect of the Federal Employers' Liability Act. Hence, leave to file a trial amendment was requested and granted and the complexion of the case was changed to that extent. In answering the trial amendment, the defendant reiterated the previous objections based on the failure to substitute the Federal Agent in time, and also specially excepted to the trial amendment, because it showed upon its face that Mrs. Mary Preston as Administratrix had appeared in the cause suing James C. Davis, Federal Agent, for the first time more than two years after termination of Federal control

(R., 21-2). Defendant, however, adopted in its answer to the trial amendment the other pleas found in its answer to the amended original petition (R., 23).

The cause was submitted to the jury November 29, 1922, following which a verdict was returned and received, and upon the verdict the Court entered a judgment against James C. Davis, Federal Agent, in the sum of three thousand seven hundred fifty dollars ($3,750.00), with interest and costs (R., 34). The cause was duly appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, but by the order of the Supreme Court of Texas, acting under statutory power, the case was transferred to the Ninth Supreme Judicial District of Texas, at Beaumont. It was there heard and the judgment of the District Court was affirmed (R., 86). The appellant regularly filed his motion for rehearing, setting up all of the grounds presented in this petition and others, which motion was overruled by the Court of Civil Appeals on May 5, 1924.

Thereafter, on June 28, 1924, your Petitioner filed his petition for a writ of error, requesting the Supreme Court of Texas to review the action of the Court of Civil Appeals, therein setting forth all of the questions now involved in this petition. The writ was granted and the cause regularly heard by the Supreme Court of Texas, which handed down its decision on March 27, 1929, also affirming the judgment of the trial court and of the Court of Civil Appeals (R., 131-136). Your Petitioners filed their motion for rehearing with the Supreme Court of Texas April 10, 1929,

setting forth all the questions involved herein. Said motion was overruled on April 24, 1929 (R., 136). The Supreme Court of Texas is the Court of last resort in that State and from its final judgment Petitioners now seek relief, relying upon the reasons presently shown and presenting this petition pursuant to the provisions of Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344).

Reasons Relied On for the Allowance of the Writ.

In the State courts Petitioner set up and claimed certain rights, privileges and immunities under certain statutes of the United States, which said privileges and immunities are invaded and denied by the adverse judgment of the Supreme Court of Texas herein, to wit:

1. This action being one cognizable under the Federal Employers' Liability Act approved April 22, 1908 (35 Stat. 65, C. 194, Comp. St. Sec. 8657, 8665), it appears, upon consideration thereof, that the rights and obligations of the Petitioner depend upon that Act and applicable principles of common law as interpreted by the Federal courts. Just as held in *Chicago, M. & St. P. Ry. Co. vs. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564, Petitioner here contends that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death upon which the action is predicated. The circumstances are closely similar to those set forth in

the opinion of Mr. Justice Butler in the Coogan case.

Decedent, W. P. Preston, was found dead on or adjacent to the tracks of Houston Belt & Terminal Railway Company at Houston, Texas, on February 15, 1919, said tracks then being controlled and operated by the Director General of Railroads. There was no eye-witness to his death and resort was had to circumstances to support the inference of negligence as a proximate cause of said death, it being claimed that negligence by the Director General consisted in furnishing an unsafe place to work, in that there was a loose steel rail constituting an obstruction where Preston attempted to alight from the string of cars.

The proof is found entirely insufficient to support the inference that the death was thus caused. An indentation in shell ballast near the end of such rail is adopted as the pivotal circumstance leading to the necessary inference, it being supposed that this indentation was made by Preston's heel on the tragic occasion of his death, but the proof that this was a heel print or that it was made by Preston rather than someone else is wholly circumstantial and devoid of probative value as will elsewhere be shown. It was a stormy night, being the night of the severe storm that wrecked the city of Corpus Christi, Texas, and the effect of the storm was felt in Houston. Other circumstances suggesting how Preston might have met his death will be exhibited as alternative to those relied upon for this recovery. He had on a long overcoat which might in some way have gotten caught as he alighted from the car in question. The severe

wind might have upset him. He might otherwise have stumbled. It will be submitted that there is no more room here for an inference of negligence as a proximate cause of Preston's death than is found in the Coogan case, *supra*, where it was claimed that the deceased caught his foot under an air pipe line and a mark on one of his shoes was utilized as indicating the manner of his death.

2. This suit was filed on February 26, 1920. On May 31, 1922, it was attempted to substitute James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. The Act of Congress entitled "An Act to Prevent the Abatement of Certain Actions," approved February 8, 1899, remained at the time in full force and effect and was applicable, precluding the attempted substitution. By reason of its provisions, the action abated and Petitioner submits that, after such abatement, any steps taken as against the Federal Agent amounted to the beginning of a new action. The enactment of Congress, effective March 3, 1923 (42 Stat. L. 1443), was, of course, not then available. To now have the benefits of this last-mentioned statute, Respondent must indicate that the action was "properly commenced within the period of limitation prescribed," this being the requirement of the statute of 1923, as prerequisite to the relief from the provisions of said Act of February 8, 1899, requiring substitution within one year after retirement of the predecessor.

Therefore an inquiry arises as to whether or not the action was thus "properly commenced" within the

prescribed period of limitation. It has been the contention of Petitioner throughout the case that it was not "properly commenced," and, furthermore, that it was not thus commenced *within the prescribed period of limitation,* which contention, if sound, would of necessity lead to the conclusion that the one-year statute would have to apply, thus voiding the jurisdiction of the State Court *in toto,* not to mention the bar of limitations, which is presented as a separate ground of error.

In overruling this contention and in upholding the substitution and the jurisdiction of the State courts under the circumstances, the Supreme Court of Texas has denied the Petitioner his rights, privileges and immunities under both the statutes above mentioned. More than two years following the termination of Federal control elapsed before the substitution was attempted and when it was accomplished Mrs. Preston was suing individually and had never qualified as Administratrix. Some months later she qualified as Administratrix and intervened in the lawsuit. An inquiry as to whether or not the suit was "properly commenced" would involve the question whether or not it was necessary for the suit to have been brought by an Administratrix within the two-year period of limitations prescribed by the statute.

3. The Transportation Act of 1920, as already indicated, establishes a two-year period of prescription with reference to causes of action arising out of Federal control of railroads (41 Stat. L., 461). Subdivi-

sion (*d*) thereof provides that "actions, suits, proceedings and reparation claims of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the Agent designated by the President of the United States under subdivision (*a*)." It is the contention of Petitioner that the substitution attempted in compliance with this statute, more than two years after termination of Federal control, was ineffective, for the reason, not only that the one-year statute mentioned in the next preceding paragraph would be controlling, resulting in an abatement, but, further, because the two-year period of prescription found in subdivision (*a*) of Section 206 of the Transportation Act became applicable due to the abatement and prescribed, *not only the remedy, but the right of action also.* Since this is a suit against the Government, the litigant is required to closely follow the conditions set forth in the applicable statutes through the medium of which the consent of the Government to be sued is conveyed. It is submitted as a logical construction of the statute that Congress did not intend that a lawsuit *filed against the Director General* should be allowed to sleep on the docket of any court for an indefinite period of time long past the period of prescription set forth in the Act, then to be brought forth for trial with the right at any time before satisfaction of the judgment to avail of the substitution privilege. The ruling of the Supreme Court of Texas to the contrary deprives Petitioner of his right, privileges and

immunities under the 1920 Transportation Act, particularly in respect to the scope and effect of the provisions thereof establishing the period of prescription.

As an important factor in this problem, we mention again that suit was filed as against the Director General on May 26, 1920. The Court judicially knows that Federal control ended at 12.01 a. m., March 1, 1920; also that on March 11, 1920, the President designated Walker D. Hines as the first Federal Agent. It was May 31, 1922, when the first effort to accomplish substitution was made. During that period Walker D. Hines resigned as Federal Agent and John Barton Payne was appointed as his successor and Payne in turn resigned and James C. Davis was appointed. Again it should be noted that up to the time of trial, suit had proceeded in the name of Mrs. Preston individually and not as Administratrix. After all parties had rested and all of the evidence was in, the qualification and intervention of Mrs. Preston as Administratrix occurred, all of which was much more than two years following termination of Federal control.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Texas, commanding that Court to certify and send to this Court for its review and determination, on a day to be named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 188, James C.

Davis, Federal Agent, *et al. vs.* Mrs. Mary Preston, Administratrix, and that the said decree of the Supreme Court of Texas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JAMES C. DAVIS, FEDERAL AGENT,
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By SIDNEY F. ANDREWS,
W. L. COOK,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 188

JAMES C. DAVIS, FEDERAL AGENT, ET AL.,
PETITIONERS,

VS.

MRS. MARY PRESTON, ADMINISTRATRIX, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Texas in this cause has not yet been published in the Official Reporter. It is found in the record of this cause at pages 130-136, inclusive.

II.

Jurisdiction.

1. The judgment of the Supreme Court of Texas was entered March 27, 1928, and the order of said Court overruling the motion for rehearing was entered on April 24, 1929 (R., 136). Under the Constitution and statutes of Texas, the Supreme Court of Texas is the Court of last resort in that State, and the overruling of the motion for rehearing terminated the litigation and established a final judgment, from which relief is sought in this Honorable Court.

2. Mrs. Mary Preston, as Administratrix, recovered a judgment against James C. Davis, Federal Agent, in the amount of $3,750.00, with interest and Court costs added (R., 34). The recovery is held as under Federal Employers' Liability Act based upon the death of W. P. Preston, deceased, who was a switchman in the employment of the Director General of Railroads on Houston Belt & Terminal Railroad at Houston, Harris County, Texas.

The jurisdiction of this Court is invoked under the provisions of the United States Judicial Code, paragraph (*b*), Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344).

The rights, privileges and immunities in issue under Federal statutes are stated in the petition and it thereby appears just how the issues arose. This may

be briefly restated as follows:

(*a*) The action being one for damages on account of death alleged to have been negligently caused to an employee engaged in interstate commerce, it is now presented that the evidence was insufficient to take to the jury the issue of negligence as a proximate cause of the death.

(*b*) The action is pending as against the Federal Agent, the suit having been originally filed on February 26, 1920, against the Director General of Railroads. No substitution of a Federal Agent for the Director General was attempted until May 31, 1922, or more than two years after the termination of Federal control of railroads. The President had successively appointed two Federal Agents, who had retired from office prior to this time. Furthermore, when this substitution was formally ordered by the trial Court on May 31, 1922, Mrs. Preston had not been qualified as Administratrix and was not suing as such. It was months later, upon the trial, after the evidence was all taken and the parties had rested, that she intervened through the medium of a trial amendment and, for the first time, as Administratrix sued James C. Davis, Federal Agent. It is the contention of Petitioner that the suit abated, due to the application and effect of the statute of February 8, 1899.[1] It is further the contention of Petitioner that the Act of March 3, 1923,[2] invoked by respondent, could not be effective to avoid

[1] See Appendix, p. 29. - 32
[2] See Appendix, p. 30. - 33

the abatement in any event, unless the action as originally brought was "properly commenced" within the meaning of such statute. It is the contention of Petitioner that if it was necessary to sue by Administratrix in order to meet the demands of the statute, the abatement under the one-year's statute was accomplished, and there could be no relief under the subsequent statute. Of course, the necessity for suit by Administratrix arises out of the fact that the decedent met his death while engaged in interstate commerce. This draws into effect the Employers' Liability Act (35 Stat. 65, C. 149 (Comp. St. Sections 8657-8665)).

(*c*) The Transportation Act of 1920 contains a two-year prescription provision against actions arising during Federal control of railroads (See Transportation Act, 1920, Sec. 206; 41 Stat. L., 461).[3] Petitioner contends the present action is reached by that prescription. Incidental questions arise. One is the effect to be given in this connection to the Act of February 8, 1899.[4] Under it, this action abated in any event one year after the retirement of the first Federal Agent, which, as the Court judicially knows, occurred on May 14, 1920, at which time the President appointed John Barton Payne as Federal Agent in lieu of Walker D. Hines, who had previously held the position. After abatement, the action was open to limitations and the prescription of both the Employers' Liability Act and of the Transportation Act of 1920 would reach the right of action as well as the

[3] See Appendix, p. 26. - 32
[4] See Appendix, p. 26. - 32

remedy. In this connection and as meeting the contention of Respondent that the Act of March 3, 1923, would relieve this situation, attention is called to the holding of this Court that such a statute cannot be given retroactive effect if limitation has already barred the right of action. (See *William Danzer & Co., Inc., vs. Gulf & S. I. R. Co.*, 268 U. S. 663, 45 Sup. Ct. Rep. 612).

Taking up *seriatim* the foregoing issues as outlined, we present them as briefly as practicable consistent with clearness and accuracy.

As to the Issue of Negligence and Proximate Cause.

The essence of the allegation of negligence proximately causing the death of the decedent is that he had been furnished an unsafe place to work, particularly due to the presence of a steel rail alongside the track, against which he is alleged to have tripped or stumbled as he tried to alight from a string of moving cars; thus being caused to go under said cars and meet his death (R. 12 and 20). The record also shows that the Federal Agent, by his attorneys, requested the Court to give a peremptory instruction in his behalf, which was refused (R. 28).

The seventh assignment of error as presented in the brief on appeal in the Court of Civil Appeals, and carried forward into the proceedings on writ of error before the Supreme Court of Texas, reads as follows:

> "The trial court erred, to the prejudice of appellant, in refusing the request of James C.

> Davis, Federal Agent, for a peremptory instruction, because it wholly failed to appear from any evidence that the death of plaintiff's husband was proximately caused by any negligence of the Director General of Railroads, or any of his agents, servants or employees."

This assignment is found in the Record at page 37. In the petition for writ of error before the Supreme Court of Texas this same matter is found presented on pages 97-8 and on pages 102-119 of the record.

To draw the attention of the Court as directly as possible to the issue as to the sufficiency of the proof, we first call attention to the statement found in the opinion of the Supreme Court of Texas on this subject. We quote from the opinion as appearing in the Record, at page 134, as follows:

> "The evidence plainly supported the finding that the Director General by his agents was negligent in leaving a ninety pound iron rail about a foot and a quarter from the coach steps where it was apt to be encountered by a switchman in alighting from the train and walking beside the track in the performance of his regular duties. With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combating a thirty-five miles an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body

> actually caught and mangled beneath the cars as they proceed a short distance farther; there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied his administratrix on the issue of proximate cause'' (R. 134).

Passing by entirely the question of negligence in having the ninety-pound rail alongside the track, which was evidently there for replacement, we attack the problem solely from the standpoint of proximate cause. The Supreme Court of Texas says that the evidence discloses the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail. We challenge this as not supported by any evidence. It appears that after Preston was found dead, the members of the train crew noted this particular indentation in shell ballast and talked about it, groping, as it were, for some explanation as to how Preston met his death. But the proof is lacking in any convincing quality that this was a heel print in the shell ballast, and furthermore, if it be admitted that it was a heel print, there is no proof whatever that it was Preston's heel print, because it becomes necessary to assume what it is sought to prove, in order to arrive at this conclusion. In other words, it is necessary to suppose without proof that Preston attempted to alight from a moving string of cars in near proximity to the rail in question and made the claimed heel print.

But the Court says that it was Preston's duty to alight at such point and that his next step would be made about where he would be tripped by the end of the rail. The proof does not support such an inference. The only evidence as to the work Preston had to do indicated that this work would be performed some one hundred or more feet down the track beyond where this supposed heel print was found (R. 44). In other words, he was required under his duties to make a coupling and he could have ridden more than one hundred feet farther along and alighted at the point where the coupling was to have been made. It is true there was some testimony that it was customary for the members of the switching crew to alight in the vicinity of McKinney Avenue, and this heel print was not far away from the intersection of McKinney Avenue over a series of railroad tracks (R. 51-2).

The Supreme Court of Texas refers to the thirty-five mile an hour wind as a factor supporting somewhat the contention that it was Preston who made this heel print, and that his stumbling against the steel rail caused his death. With a thirty-five mile gale blowing and Preston having on a long rain coat extending below his knees (R. 62), it is submitted that it is not essential to suppose that he stumbled against this steel rail, when he might easily have gotten his rain coat caught or been unbalanced by the wind, or he might have slipped and fallen.

The Supreme Court also refers to the cap and lantern. Certainly with a thirty-five mile gale blowing, it would not be expected that a hat would remain at the

point where it had fallen, and the same might be said of a lantern. But allowing for whatever probative force the location of these objects at the time they were found has, nevertheless, it would have to be admitted that if Preston fell, however it may have occurred, his hat and lantern would have been dropped somewhere near the point of the fall, and all that the hat and lantern would indicate would be that he did fall and had to turn them loose, and would not indicate how he was caused to fall.

A factor that the Supreme Court of Texas overlooks entirely is that the supposed heel print might easily have been made by other members of the crew or by members of the public in the vicinity of McKinney Avenue, or by the crossing watchman or by other railroad employees. The evidence clearly shows this possibility and there is no evidence to indicate that Preston made this heel print, unless the mere fact of his being crushed to death under these cars is such evidence (R. 44, 46, 65).

To support the foregoing analysis, which presents as fully as need be the respective contentions of the parties on this question of the sufficiency of the evidence, we now make certain references to the record. The engine foreman under whom Preston worked explained that this was a Santa Fe train that had come in from the North handling interstate passengers destined for Galveston, and, on account of the brewing storm, the equipment was to be held over night at Houston in the coach yard to be carried on to destina-

tion the next day. The passengers were disembarked at Houston under the circumstances (R. 60).

Preston was with Moore, the section foreman, in the fourth car from the engine, as the switch engine pulled this empty passenger train toward the coach yard. The movement required that the train cross McKinney Avenue. As the train approached McKinney Avenue, Preston got up and went to the front door and out it, and was not seen any more until he was found dead (R. 61). The train had to go quite a distance beyond McKinney to reach the crossover switch, where it was backed up on what was termed the "rip" track. There was a car on this rip track and the crew had to couple into it and shove it along beyond McKinney Avenue in order to leave room on the near side of McKinney Avenue for this passenger equipment. This car was eighty feet long and the near end of it toward McKinney Avenue was about thirty feet from the street line. Thus, the point where the coupling had to be made was one hundred and ten feet from McKinney Avenue crossing (R. 64). There is a plat attached to the record which reflects with reasonable accuracy the conditions on the ground. It was shell ballast all the way from the intersection at McKinney Avenue down to where this coupling had to be made (R. 64). There is no controversy about any of the matters we have just stated. There is indeed little controversy about any of the evidentiary facts, the controversy being as to the conclusions to be drawn therefrom.

Preston was found dead about two blocks, or a little more than that, south of McKinney Avenue and near

the Milby Street crossing (R., 62). The engine foreman, Moore, missed Preston first when it was necessary to make the coupling in question. Moore made this coupling and then walked around the standing car to a point near McKinney Avenue, when some one came up bringing a hat and asked if it were not Preston's. Inquiry developed that Preston had been found dead near Milby Street crossing (R. 45).

It appears that Houston Belt & Terminal Railway Company maintained a coach yard near McKinney Avenue and that switching crews had to make more or less frequent trips to this point with passenger equipment. Moore, the engine foreman, says it was customary for the long field man, this being the position that Preston occupied, to get off near McKinney Avenue. This is also corroborated by the other witnesses, but there is no statement that such custom was controlling under circumstances such as on the occasion in question, where a coupling had to be made as described.

The civil engineer's description of the situation on the ground with measurements, as intended to be shown by the plat attached to the record, is found in the Record at page 80. We do not deem it necessary to elaborate this testimony, but we give the reference in case the Court should desire to consult this testimony.

With reference to the hat and lantern, the testimony seems to be that these objects were found about the same distance from McKinney Avenue as the steel rail in question, and it appeared that the end of the steel rail was about 12 to 20 feet from the street line

(R. 79). The string of cars that killed Preston was moving on the outbound main line. The testimony as to the hat and lantern placed these objects on or beyond the inbound main line. The two main-line tracks were fourteen feet apart. With reference to the heel print, the engine foreman said that he found what looked like a heel print, but he could not say it was Preston's (R. 47). He also stated it was raining and that the wind was blowing about thirty-five miles an hour and that Preston had a rain coat on which struck him down below the knees (R. 41).

The engine foreman also stated that he, with his crew, had been down in the vicinity of McKinney Avenue a short while before and that some of the men got off before that and that one of them could have made this heel print getting off at that place when he stepped off on that occasion. He also stated that the watchman walks back and forth at that point and that coach repairers also walk in that vicinity, and that they also have a track walker that walks the track (R. 65).

Other witnesses who testified were J. S. Cloud, a member of the crew with Preston, A. H. McDaniel, who was also a member of the crew, and J. B. Quarles, who was a railroad employee, but not a member of the same crew with Preston, but he was in the vicinity the night Preston met his death, working as a car man. It was Quarles who found the hat. He said: "I am not clear on just where I found the hat unless it was between the tracks of the inbound main; that is the best I can recall." Another witness, T. C. Morris, the

crossing flagman at McKinney Avenue, also testified. These constitute all of the witnesses who gave any testimony at all material to this inquiry.

None of these witnesses saw the accident. There is no testimony available to meet the demand for proof that Preston stumbled against the steel rail in question, except through the medium of this supposed heel print. Some of the witnesses apparently reached the conclusion that it was Preston's heel print, but, of course, they didn't know. Others, as for instance the engine foreman, expressed the view that while Preston might have tripped on this rail, he also might have gotten his rain coat caught or his clothes caught, or otherwise been killed. The witness J. S. Cloud said: "He could have stepped off and hit the rail and fell, or could have stepped off and got his clothing caught or could have stepped off and slipped and gone under the wheels. There are a half dozen ways it could have happened; you don't know how many ways a man can be hurt by a railroad until you get hurt about fifteen times. It was just like I say, we did discuss that theory; in other words, we could not swear to nothing because we did not see him. The fact of the case is nobody could swear what side he got off, as far as that is concerned, because we don't know. It was dark and rainy" (R. 54-55).

The witness A. H. McDaniel said he examined along the tracks for signs all the way from McKinney Avenue down to Milby Street and that he found no marks showing evidence that Preston had been dragged (R. 56). He noted the foot print with the others that

night. He also found pieces of clothes and little pieces of flesh on the crossing boards at Milby Street. They were in the middle of the track on the north side of Milby on the outbound main line (R. 57).

The witness Quarles in talking about the heel print said it was not a perfect print of a heel, but it looked something like one. He would not undertake to swear that it was a heel print (R. 75). The watchman saw it, but he said you could not tell definitely how long it had been made. All that was undisputed was that it looked like a heel mark and it looked to be fresh (R. 78). This watchman also told about the violence of the wind. He said he had a slicker on and when the train cleared him so the wind could blow on him, he had to jump around to keep from falling over (R. 78). With reference to the location of the heel print and the place where the hat and lantern were found, he testified as follows:

> "I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was further over to the left, but just about the same distance from McKinney Street. The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street" (R. 79).

We rely upon the application and effect of the decision of this Court in the case of *Chicago, M. & St. P. Ry. Co. vs. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564. In that case Coogan met his death underneath a train. An effort was made to show negligence, particularly in respect to the dangerous proximity of a pipe, and the issue of proximate cause was sought to be supported by a mark on Coogan's shoe. Analysis resulting in the rejection of the contentions supporting liability will apply with much force in this case, the circumstances and issues being strikingly similar.

As to the Issue of Abatement.

It has already been indicated that this suit was originally filed against the Director General on February 26, 1920, and that no effort at substitution was made until May 31, 1922. The Act of February 8, 1899, is copied in the appendix.[5] This was a statute designed to prevent the abatement of certain actions. This statute has been held applicable by this Court to actions by or against the Federal Agent appointed by the President to wind up the affairs of the United States Railroad Administration. In the case of *John Barton Payne, Director General, vs. Industrial Board of Illinois,* 42 Sup. Ct. 462, certiorari brought by the Federal administration was dismissed for want of jurisdiction in a *per curiam* opinion, citing this statute and the case of *LeCrone vs. McAdoo,* 253 U. S. 217-219. The applicability of this statute was recog-

[5] See Appendix, p. ~~29.~~ 32.

nized by Congress in passing the Winslow Act, amending the Transportation Act of 1920, which amendment became effective March 3, 1923. The Winslow Act is copied in the appendix.*

The first Federal Agent was appointed on March 11, 1920, Walker D. Hines being the appointee. He retired from this office and on May 14, 1920, the President designated John Barton Payne as the successor Federal Agent. He in turn retired and on March 26, 1921, the President designated James C. Davis as Federal Agent. Thus more than one year elapsed after the retirement of Walker D. Hines and of John Barton Payne, who in turn held the position of Federal Agent, and yet there was no substitution. Furthermore, there was no substitution of James C. Davis until more than one year after his appointment and assumption of the duties of his office.

Under these circumstances, it is the contention of Petitioner that this action abated. Certainly this is true unless the Act of March 3, 1923 (the Winslow Act), can be invoked to relieve the situation. But does this Act reach the situation? Petitioner contends that the action was not properly commenced because, under the terms and provisions of the Federal Employers' Liability Act, Mrs. Preston was required to bring her action as Administratrix, because her deceased husband met his death while engaged as an employee in furtherance of interstate commerce. No suit was brought by Administratrix until November of 1922. This was long after the lapse of two years

* See Appendix, p. ~~90~~ 33

prescribed in the Transportation Act of 1920, and it is one of the provisions of the Winslow Act that it would apply only to actions "properly commenced" within the period of limitation..

It is said that the principle found in *M. K. & T. Ry. vs. Wulf,* 226 U. S. 576, would be applicable. This holds that suit brought under the Federal Employers' Liability Act by the individual survivor can later be amended to sue by Administratrix, and that the original action would be sufficient to stop the running of the statute. It is also contended that it is the complete test of whether or not the action was "properly commenced" within the meaning of the Winslow Act, if it be determined whether or not it was brought in such form as to stop limitations. Petitioner contends that such was not the purpose of Congress in requiring that the action be properly commenced, and that the requisites are not met unless the action shall have been brought in such form that all outstanding liabilities would be taken care of should judgment be entered upon the pleadings. This evidently was in mind when it was provided that substitution might be accomplished at any time prior to satisfaction of the judgment.

It does not appear that this Court has passed upon exactly this point, that is to say, whether or not suit by an individual is sufficient within the meaning of this statute, when the suit properly should have been brought by Administratrix.

As to the Two-year Period of Limitations.

Under the decision of this Court in *William Danzer & Co., Inc., vs. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 Sup. Ct. Rep. 612, it cannot be doubted that the two-year period of prescription set forth in the Transportation Act of 1920 reaches the right of action as well as the remedy. In that case this Court construed Section 206 (*f*) of the Transportation Act, which provided that the period of Federal control should not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control. But it so happened that under the applicable statute of the State of Mississippi, and prior to the passage of the Transportation Act, the cause of action asserted by William Danzer & Company was barred if the period of Federal control should be included in the period of prescription. An effort was made to invoke the provisions of 206 (*f*) of the statute, and this Court held that such provisions could not be given retroactive effect upon a right of action already barred. In like fashion, Petitioner presents that the Winslow Act cannot be given retroactive effect upon a cause of action already barred. Due to the abatement, which undoubtedly was accomplished under the statute of February 8, 1899, limitations reached this cause of action. When the Winslow Act was passed, therefore, the entire right of action had already passed out of existence. Like contentions might be made under the

period of limitations prescribed in the Federal Employers' Liability Act, but the result is the same.

Wherefore, because there was no sufficient evidence to take the cause of action asserted to the jury, because the cause abated and was not revived, and because following abatement the bar of the statutes of limitation prescribed the right as well as the remedy, the several courts of Texas have erred to the prejudice of your Petitioner and relief is asked at the hands of this Court.

Respectfully submitted,

SIDNEY F. ANDREWS,
W. L. COOK,
Attorneys for Petitioner,
James C. Davis, Federal Agent.

APPENDIX.

An Act Entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, c. 121, U. S. Compiled Statutes of 1916, Section 1594.

No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.

(See Brief, pp. 14, 15 and 25.)

Paragraph (a), Section 206, Transportation Act of 1920, as Amended February 24, 1922, 41 Stat. L., 461.

Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent

shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier; except that actions to enforce awards made by the Commission under the provisions of subdivision (*c*) against the agent so designated by the President may be brought within one year after the date of the Commission's award.

(See Brief, p. 15.)

The Winslow Act, Paragraphs (h) and (i), Section 206, Transportation Act of 1920, 42 Stat. L., 1443.

Actions, suits, proceedings, and reparation claims, of the character described in subdivision (*a*), (*c*), or (*d*), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (*a*), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to en-

force or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (*h*) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect.

(See Brief, pp. 14 and 25.)

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No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929.

JAMES C. DAVIS, FEDERAL AGENT, ET AL.,
Petitioners,

v.

MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

BRIEF FOR PETITIONERS

— BY —

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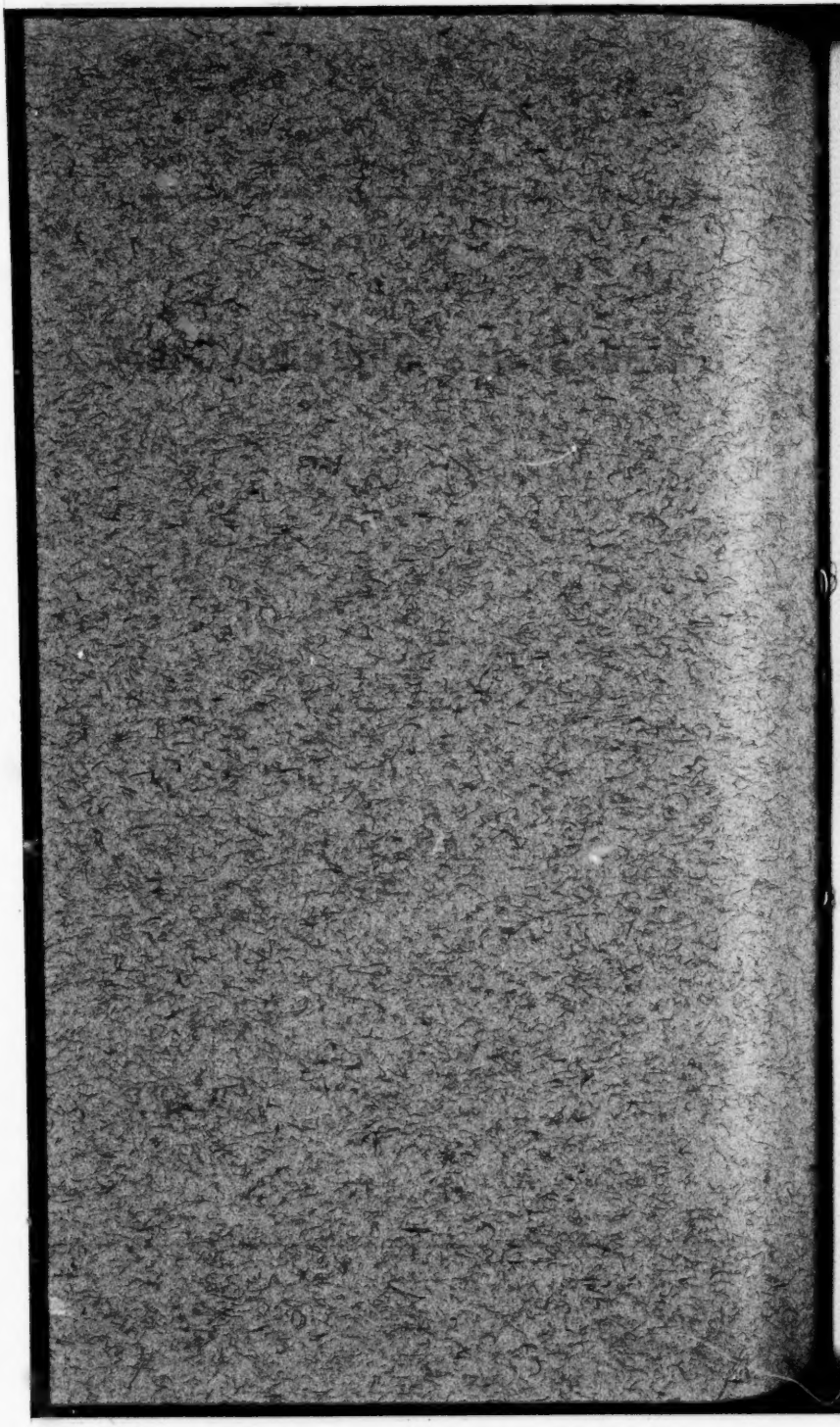

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BRIEF FOR PETITIONERS

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Texas in this cause has not yet been published in the Texas Reports, but it is found in the reporter system in 16 S. W. (2d), 117. It is also found in the record of this cause at pages 130-36, inclusive.

II.

Jurisdiction.

The judgment of the Supreme Court of Texas was entered March 27, 1928, and the order of said court

overruling the motion for rehearing was entered on April 24, 1929. (R. 136.) Under the Constitution and statutes of Texas, the Supreme Court of Texas is the court of last resort in that State, and the overruling of the motion for rehearing terminated the litigation and established a final judgment, from which relief is sought in this honorable court.

The petitioner is the Federal Agent, representing the United States in connection with matters arising out of the Federal administration of railroads. James C. Davis is the designated agent in the litigation as it now appears before this court, because the judgment stands as against him in that capacity, notwithstanding his retirement and the appointment of his successor. He is joined as petitioner by Fidelity & Deposit Company of Maryland, surety on the appeal bond.

Respondent is Mrs. Mary Preston, Administratrix of the estate of her deceased husband, W. P. Preston.

The action as finally carried to judgment was under and pursuant to the provisions of the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 149; Comp. Sections 8657-8665), to recover damages for the benefit of Mrs. Preston as the surviving widow of the deceased. The employer of W. P. Preston at the time he met his death was the Director General of Railroads, operating the properties of Houston Belt & Terminal Railway Company under the authority of Congress. Preston met his death in a switch yard in Houston, Harris County, Texas, on September 15, 1919, his death having been caused by his being run over and crushed and dragged beneath a certain car or cars engaged in interstate

commerce and being handled by Preston and others of his switching crew in furtherance of such commerce.

Suit was filed on February 26, 1920, against "Walker D. Hines, Director General of Railroads." (R. 2.) The suit remained inactive until May 31, 1922, when Mrs. Preston, suing individually and not as Administratrix, filed and presented a motion for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This motion was opposed because of the lapse of time and on two grounds specifically, that the Act of February 8, 1899 (Appendix, p. 27), prevented the substitution after lapse of one year, and that, in any event, this substitution could not, under the circumstances, be accomplished after the lapse of two years subsequent to the termination of Federal control. (R. 8-9.) The motion was, however, granted on May 31, 1922. (R. 10.) The same grounds as were presented in objection to the substitution were again brought to the attention of the court by the defendant, James C. Davis, Federal Agent, through the medium of a plea in abatement, filed November 5, 1922, but this was overruled. (R. 10-11.)

In addition to the foregoing, James C. Davis, answering in the cause, presented a general demurrer and general denial and pleas of limitation arising, not only under the Federal Employers' Liability Act, but also under the Transportation Act of 1920. (R. 15 *et seq.*)

After the parties had rested, plaintiff's attorneys discovered their oversight in not having qualified Mrs. Preston as administratrix and in not having her intervene in that capacity in light of the controlling effect of the Federal Employers' Liability Act. Hence, leave to file a trial amendment was requested and

granted and the complexion of the case was changed to that extent. In answering the trial amendment, the defendant reiterated the previous objections based on the failure to substitute the Federal Agent in time, and also specially excepted to the trial amendment, because it showed upon its face that Mrs. Mary Preston as Administratrix had appeared in the cause suing James C. Davis, Federal Agent, for the first time more than two years after termination of Federal control. (R. 21-2.) Defendant, however, adopted in its answer to the trial amendment the other pleas found in its answer to the amended original petition. (R. 23.)

After the parties had rested and before the cause was submitted to the jury, the defendant requested the trial court to instruct the jury peremptorily in his behalf, but this request was refused. (R. 28.)

The cause was submitted to the jury November 29, 1922, following which a verdict was returned and received, and upon the verdict the court entered a judgment against James C. Davis, Federal Agent, in the sum of $3,750.00, with interest and costs. (R. 34.) The cause was duly appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, but by the order of the Supreme Court of Texas, acting under statutory power, the case was transferred to the Ninth Supreme Judicial District of Texas, at Beaumont. It was there heard and the judgment of the District Court was affirmed. (R. 86.) The appellant regularly filed his motion for rehearing, setting up all of the grounds presented herein and others, which motion was overruled by the Court of Civil Appeals on May 5, 1924.

Thereafter, on June 28, 1924, petitioner filed

his petition for a writ of error, requesting the Supreme Court of Texas to review the action of the Court of Civil Appeals, therein setting forth all of the questions now involved in this proceeding. The writ was granted and the cause regularly heard by the Supreme Court of Texas, which handed down its decision on March 27, 1929, also affirming the judgment of the trial court and of the Court of Civil Appeals. (R. 131-136.) Petitioners filed their motion for rehearing with the Supreme Court of Texas April 10, 1929, setting forth all the questions involved herein. Said motion was overruled on April 24, 1929. (R. 136.) The Supreme Court of Texas is the court of last resort in that State and from its final judgment petitioners now seek relief, relying upon the provisions of Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344), for jurisdiction.

Claims Advanced and Rulings Made.

In the State courts petitioners set up and claimed certain rights, privileges and immunities under certain statutes of the United States, which said privileges and immunities are invaded and denied by the adverse judgment of the Supreme Court of Texas herein, to wit:

1. This action being one cognizable under the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 194, Comp. St. Sec. 8657, 8665), it appears, upon consideration thereof, that the rights and obligations of petitioners depend upon that Act and applicable principles of common law as interpreted by the Federal courts. Just as held in *Chicago, M. & St. P. R'y Co. v. Coogan,* 271 U. S. 472, 46 Sup.

Ct. Rep. 564, petitioners here contend that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death upon which the action is predicated, and that there was error in not granting the request for a peremptory instruction and error in the appellate courts in upholding the action of the trial court on this point.

2. It is contended by petitioners that this action abated by virtue of the application and effect of the Act of Congress entitled "An Act to Prevent the Abatement of Certain Actions," approved February 8, 1899. (Appendix, p. 27.) It is adversely contended that, even though there was an abatement under the statute mentioned, this is relieved by virtue of the application and effect of the Winslow Bill, which became effective March 3, 1923. (42 Stat. L. 1433.) (Appendix, pp. 28-29.) In reply to this contention petitioners say that the provisions of the Winslow Bill are not available because the action was not "properly commenced" within the prescribed period of limitation, without which the saving effect of this last mentioned statute cannot be invoked.

3. Petitioners further contend that the action is barred by limitation under (a) the two-year period limiting actions that may be brought under the Federal Employers' Liability Act, and (b) the same period limiting actions that may be brought against the Federal Agent under the Transportation Act. (Appendix, pp. 27-28.) It is adversely contended that, since suit was brought against the Director General of Railroads within the limitation period, viewed from the standpoint of each statute, there could be no bar by prescription. But petitioners present that this cause undoubtedly

did abate and that when it abated, limitations became effective and the right of action was destroyed before ever the Winslow Bill became law.

The bearing of these questions on the cause is apparent from the brief narrative of the course of the litigation already presented. It appears that the Texas courts have held the evidence to have been sufficient to take to the jury the issue of proximate cause and to justify an adverse finding on that issue. The specific ruling complained of is the refusal of the request for a peremptory instruction. In like fashion, it appears that the Texas courts overruled the contentions as to the abatement of this cause, giving effect to the Winslow Act, notwithstanding the contention of petitioners that the action had not been "properly commenced" within the period of limitation prescribed. It further appears that the Texas courts overruled the contention as to limitations, thereby disregarding the accomplishment of the abatement under the Act of February 8, 1899, which opened up the cause of action for the effect of limitations thereon.

Concise Statement of the Case.

As already indicated, this suit was filed on February 26, 1920, against Walker D. Hines, Director General of Railroads. (R. 2.) On May 31, 1922, a motion was presented for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General. The motion was opposed, but it was granted on the day it was presented. (R. 10.) During the course of the trial, Mrs. Preston qualified as Administratrix for the first time and intervened, asking leave to continue the suit in that capacity, which leave was granted over the objections of the defendant. (R. 20.) Upon the ver-

dict, which was returned on November 29, 1922, the court entered judgment against James C. Davis, Federal Agent, in the amount of $3,750.00, with interest and costs. (R. 34.)

As to the Issue of Proximate Cause.

The essence of the allegations of negligence proximately causing the death of the decedent is that he had been furnished an unsafe place to work, particularly due to the presence of a steel rail alongside the track, against which he is alleged to have tripped or stumbled as he tried to alight from a string of moving cars, thus being caused to go under said cars and meet his death. (R. 12 and 20.)

The record shows that the Federal Agent, by his attorneys, requested the court to give a peremptory instruction in his behalf, which was refused. (R. 28.)

The seventh assignment of error as presented in the brief on appeal in the Court of Civil Appeals, and carried forward into the proceedings on writ of error before the Supreme Court of Texas, reads as follows:

> "The trial court erred, to the prejudice of appellant, in refusing the request of James C. Davis, Federal Agent, for a peremptory instruction, because it wholly failed to appear from any evidence that the death of plaintiff's husband was proximately caused by any negligence of the Director General of Railroads, or any of his agents, servants or employes."

This assignment is found in the Record at page 37. In the petition for writ of error before the Supreme Court of Texas this same matter is found presented on pages 97-98 and on pages 102-119 of the Record.

To draw the attention of the court as directly as

possible to the issue as to the sufficiency of the proof, we first call attention to the statement found in the opinion of the Supreme Court of Texas on this subject. We quote from the opinion as appearing in the Record, at page 134, as follows:

> "The evidence plainly supported the finding that the Director General by his agents was negligent in leaving a ninety-pound iron rail about a foot and a quarter from the coach steps where it was apt to be encountered by a switchman in alighting from the train and walking beside the track in the performance of his regular duties. With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combating a thirty-five miles an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body actually caught and mangled beneath the cars as they proceeded a short distance farther; there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied his administratrix on the issue of proximate cause." (R. 134.)

Since we attack the inference that there was evidence "disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground, etc.," it is necessary to consult the Record to see what are the real facts.

The witnesses are: M. A. Moore, engine foreman of the crew in which Preston worked, whose testimony appears in the Record at pages 40-50 and 60-71; J. S. Cloud, a switchman in the same crew, whose testi-

mony appears in the Record at pages 50-55; A. H. McDaniel, also a switchman in the same crew, whose testimony appears in the Record at pages 55-58 and on page 71; J. B. Quarles, a car inspector, whose testimony appears in the Record at page 74; T. C. Morris, a crossing flagman, whose testimony appears in the record at pages 76-80; and D. E. Proper, a civil engineer, whose testimony appears in the Record at page 80.

All of the witnesses mentioned except the one last named were on duty and in the vicinity at the time of Preston's death. On the night of this tragedy it was raining and the wind was blowing a gale. (R. 41 and 63.) Because it seemed a storm was brewing, Santa Fe passenger train No. 5, south bound from Chicago, Illinois, to Galveston, Texas, was ordered held at Houston over night. The passengers were disembarked and the empty train carried to a storage track for the night. (R. 60.) Preston was a member of the switching crew that handled this empty equipment to the point of storage, but was killed under the wheels of the train before the task was completed. He was last seen walking toward the head end of one of the coaches in which he, with some other members of the crew, was riding. (R. 61.) No one saw him fall and there was no eyewitness to his death.

Preston was found dead near Milby Street, Houston, Texas, approximately two blocks beyond McKinney Avenue, in the direction of the train's outbound movement. (R. 61-62.)

There being no eyewitnesses to his death and it being essential from the standpoint of respondent to rely on an indentation in the shell ballast near the steel rail in question, as indicating that Preston met

his death by stumbling against said rail, we direct our attention specially to this one feature of the case, because it is at this point we think the case fails in respect to proximate cause. Had it not been for the utter weakness of the case at this point, it is doubtless true that the government would not have cared to raise the point for review here.

There was some doubt as to whether it was a heel print. J. S. Cloud, a member of the crew, said:

> "I was with the rest of them when they went there and examined for any signs at the McKinney Street crossing; we all walked there to see which side he got off and looked at the foot print; I could not swear to it from what I saw but my opinion—what I mean is nobody could, at least I could not, swear to what side he got off. We found what looked like a foot print in the shell there but of course it was raining pretty hard and we could not tell whether it was an old or new foot print. Seems like it was a heel print as near as I could discern. I would not venture to say how far that was from the end of the loose rails between the two main line tracks, but it seems about a step or a step and a half, possibly two; I don't know exactly what distance it was." (R. 53.)

A. H. McDaniel testified:

> "My attention was called to a mark in the shell to the left of the outbound main line in the discussion there about the death of Preston; I looked at the particular mark that was under discussion. I could not swear it was a heel print, I could not tell whether it was a heel print. If it was a heel print it was close enough to McKinney Avenue that it could have been made by any member of the crew or any passerby, I suppose." (R. 72-73.)

J. B. Quarles testified:

> "My attention was called to a mark in the shell

near the McKinney crossing, and also between the two main lines. That mark looked something like the print of a man's heel, but I could not say that it was, it was not a perfect print of a heel but it looked something like a heel, but I could not state for certain whether it was; I would not undertake to swear it was a heel. I judge it was something like six or eight feet from the board walk across McKinney." (R. 75.)

The crossing flagman, T. C. Morris, testified:

"My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two mainline tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh and we supposed it to be the heel mark where he lit; that was the supposition. * * * I surely could not tell from looking at that heel mark who made it." (R. 78.)

Aside from any doubt whether or not this was a heel mark, it is clear enough that the mark might have been made by some other member of this crew or some other railroad employe, or by some member of the public. In the first place, it was admittedly near McKinney Avenue, a thoroughfare in the City of Houston. The engine foreman, M. A. Moore, said:

"It has been quite a while, I had been down there but I don't remember whether it was twice I had been down there with the crew comparatively a short while before this; some of our men got off before that and one of them could have made this heel print getting off on that occasion if he had stepped off on that place. They would get off ordinarily at McKinney Street crossing; this was right at where the watchman walked back and forth; they may step off on the crossing—walk across there—they have got coach repairers,

you know, that go over there, no, they didn't get off of no engine over there and walk over there, they have a track walker that walks the track. No, I am not trying to tell the jury that this was Preston's heel mark, I could not swear it was Preston's heel mark. I don't know how he got caught and carried on that train down to Milby Street." (R. 65.)

In another connection this man said:

"I have seen them get off there frequently and I have got off there myself; it was a frequent thing for a man to get off at this particular place, everybody gets off there that generally works long field; * * * " (R. 47.)

The witness A. H. McDaniel states that this mark could have been made by any member of the crew or by any passerby, and that he himself had been switching out there that afternoon a short while before this particular trip. (R. 73.)

The witness J. B. Quarles says:

"I do not remember who first called my attention to that particular mark that looked like a heel mark. I suppose there had been lots of people walking around there all day and a good many that evening." (R. 76.)

It is important to note that there is no evidence to controvert the contention of petitioners that this supposed heel mark could have been made by some one else than Preston. But there are other considerations, circumstantial in character, that should be noted in this connection.

Preston was found dead approximately two blocks away from this heel mark and the rail which, it is contended, caused his death. (R. 62.) It is also notable that he was found not on the left side of the

track on which the train was moving, but on the right side thereof. (R. 62.)

Indications that he had been dragged were found on the outbound main track. Moore states that he found pieces of his underclothes and jumper about a quarter of a block beyond McKinney. On further reflection, he seemed to think it was about one hundred and fifty feet beyond McKinney where he saw the first signs that Preston had been caught. He says he saw little pieces of his undershirt and jumper but he saw no blood. (R. 47.) He did not personally pick up the hat or the lantern. Beyond the point where he found pieces of jumper and undershirt in the direction of Milby where the body was found, he found nothing except pieces of shirt, but there were no other signs in the vicinity of where the body was found at Milby Street crossing. (R. 48.)

With further reference to where he found this jumper, etc., he states it was over toward the right side of the train going out. Bearing in mind that this train was moving on the outbound main line and had already crossed McKinney Avenue, and that the body was found at Milby Street crossing, it is important to note Moore's statement as follows:

> "His body was picked up from the right side of the track, I mean inside of the track, close to the right rail; say here is the track, here is where his body was found (indicating); it was in between the rails, over towards the right. I don't know how he was drug under; he simply must have been drug. I only saw him get out of the coach; some used one side to get off and some another, you can't say which side he got off; a left-handed man would go to the left, a right-handed man would go to the right." (R. 49.)

As bearing on whether or not Preston would have attempted to alight in the vicinity of where the supposed heel print was found, it is suggested as important to consider what the crew had to do to complete the immediate job in hand. Moore testifies the purpose was to carry this passenger train equipment beyond the crossover switch in the vicinity of Milby Street and then to back it up on the "rip track" for storage. There was a car situated on this rip track thirty feet from McKinney Avenue, that is to say thirty feet beyond the street line of McKinney on the outbound movement of the train. This car was eighty feet long. It was necessary to couple into this car and by calculation, it is seen that the distance from McKinney Avenue where the coupling had to be made was one hundred and ten feet. It was Preston's duty to make this coupling because he was long field man. It was shell ballast in the vicinity of where the coupling had to be made, just as at the point where the supposed heel print was found. Preston knew he had to make this coupling. When the coupling was made, it was necessary to shove the standing car beyond McKinney and then pull up to leave the passenger equipment on the rip track on the south side of McKinney. All these matters are reflected in Moore's testimony. (R. 64-65.)

Alternative to the theory that Preston stumbled against this steel rail and was thereby caused to fall under the train, we can suggest a variety of possibilities equally as plausible and supported with equal force in the evidence. It is really impossbile to judge what happened to this unfortunate man. Moore said:

> "At the immediate time Preston was killed it was drizzling I think, wind and rain mixed up.

The wind was blowing I guess about 35 miles an hour. Preston had a raincoat on, it was a long rain coat, I don't know what brand it was. It struck down below the knees, between the knees and ankles." (R. 41.)

In another connection, Moore says:

"As to whether I think that is the reason that Preston met his death in stepping off, will say I could not think nothing because I have two ways to think. I could not answer whether I think the most probable explanation of his death is that he stepped off, hit the rail, it tripped him and threw him under the train. He never worked all day long with a raincoat on, he had on a raincoat that trip. He could have stepped off and hit the rail and tripped; he could have got his raincoat caught in the door, got his clothes caught, or anything like that; I did not know how it was." (R. 49.)

The witness Cloud says:

"He had on a slicker, that was torn all to pieces. I could not tell whether it was torn any one place more than another. His clothing was all torn off of him." (R. 54.)

Another possibility was suggested by Moore. He said:

"Such a man could, if he is standing on the steps and a very severe wind is blowing, a gale, he might somehow be caused to slip or fall and become entangled so as to be dragged under there; he could catch on; you know in all vestibuled cars they have got a little trap door; of course that trap door could fall, you see, and could catch a rain coat or catch on anything, you know, and cause it; you see the wind blowing, it might have blowed him; I wasn't there to see how it happened. The trap door could blow and catch his raincoat and then he would drag underneath." (R. 70.)

The crossing watchman said:

> "That was the night of the storm, the wind was blowing; I declare I could not tell you how strong the wind was, but it was blowing mighty hard. I had reason to notice the violence of the wind. When those coaches usually go by me it didn't seem like there was much wind, but when the train passed me and the wind came against me I had to jump around to keep from going over. When the train was going by me it was a protection to me from the wind, and when the train cleared I felt the wind especially strong. I had a slicker on myself and I had to jump around to keep from falling over." (R. 78.)

Much is made of the finding of the hat and lantern, it being claimed that these two articles were found in such position as to strongly suggest that they had been dropped by Preston as he stumbled against the steel rail in question. There is some confusion as to where these articles were found, as will be seen from the following brief references to the Record.

Moore states that an employe, whom he called a "car knocker," picked up Preston's hat. In this connection, Moore says:

> "When he came to me he was coming towards the east. He had picked the hat up on the main line, he said, on the outbound one. He did not say how far from McKinney Street crossing he picked the hat up." (R. 46.)

He further stated as follows:

> "I do not know of my own knowledge where the lantern or hat was found. The hat was presented to me by a car repairer, I don't remember who it was, I just took it, he says to me, 'Ain't this one of the switchmen's hats?' I says, 'Yes, it is Preston's' and with that—I never even noticed who it was—I ran over to the coach yard." (R. 64.)

Quarles said he rode on this train from the station going to his work in the vicinity of McKinney Avenue. He said the train pulled down and then backed up, leaving a clearance of about thirty feet from McKinney Avenue after he got off. He further says:

> "I was riding on the rear car, I got off of the rear end; I walked towards McKinney Avenue, right towards the watchman's shanty; it was in going there I picked up this man's hat; the best I can recall it was between the inbound main. I was present when his lantern was picked up. The best I can recall, that was between the inbound main and the long rip, we call it there, the next track over." (R. 75.)

Morris, the crossing watchman, says:

> "I don't remember the young fellow's name that first advised me of this man's death, he found the hat in the first place, he fetched the hat around and said one of the switchmen has lost their hat, and I says, 'Let me have it and when they come around I will give it to him and he can get it back again,' so he had to come around on the west side of the main line on the rip tracks there and he forgot something on the east rip track and went back for it, so he asked me for the hat and took it back to Mr. McDaniels I think it was, gave him the hat, and they got to looking around and found the lantern. I saw this young fellow pick up the hat, it was off east of the main line and I think between the long rip track and the short; I was speaking of the hat; it was not between the main line and the rip, it was just over the first rip track." (R. 77.)

As to the Issue of Abatement.

As already indicated, this suit was filed on February 26, 1920, against Walker D. Hines, Director General of Railroads. (R. 2.) Substitution was not attempted

until May 31, 1922, when Mrs. Preston, suing individually and not as administratrix, moved for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This was over the objections and exceptions of the defendant, as already indicated. The point was presented by plea in abatement and also by demurrer. (R. 10-11, 15 *et seq.*) Upon the trial, after the parties had rested, the court granted leave for Mrs. Preston to intervene as administratrix and prosecute the action as such. This occurred in November of 1922.

It is judicially known that Federal control of railroads terminated March 1, 1920. Walker D. Hines, Director General, was succeeded by John Barton Payne, who was, in turn succeeded by James C. Davis as Federal Agent, on March 26, 1921. The order of substitution occurred on May 31, 1922, or more than one year after James C. Davis qualified and more than two years after the termination of Federal control.

As to Limitations.

Preston met his death on September 15, 1919. Suit was filed on February 26, 1920. Substitution of the Federal Agent for the Director General was accomplished May 31, 1922. Mrs. Preston qualified as administratrix and intervened in the cause as such on November 29, 1922. Preston and the other members of his crew were engaged in furtherance of interstate commerce at the time he met his death.

SPECIFICATION OF ERRORS

Petitioner presents for consideration and review by this court the following errors which have

been carried through the Record in this cause, from its inception, in varying forms, and which are set forth in the petition for certiorari:

First Assignment.

It was error for the Supreme Court of Texas to uphold the action of the Court of Civil Appeals and of the trial court in respect to the request of the defendant below for a peremptory instruction, because, upon an examination of all the material evidence bearing upon the question, it appears as a matter of law that there was not sufficient evidence to support the inference that any negligence of the Director General of Railroads, or his agents, proximately caused the death of the decedent, W. P. Preston.

Second Assignment.

The Supreme Court of Texas erred to the prejudice of petitioner in holding that this asserted cause of action had not effectively abated under and by virtue of the provisions of an Act entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, C. 121, U. S. Complied Statutes of 1916, Section 1594. (Appendix, p. 27.)

Third Assignment.

The Supreme Court of Texas erred to the prejudice of petitioner in its holding that the asserted cause of action is not barred by limitations under the prescribed period of two years in the Federal Employers' Liability Act and under the prescribed period in the Transportation Act of 1920. (Appendix, pp. 27-28.)

ARGUMENT

As to the Issue of Proximate Cause.

The pertinent evidence has been set forth in our statement of the case. It is believed that, in a controversy as to the sufficiency of evidence to take to a jury an issue of proximate cause, precedent is of comparatively little value, since the proper conclusion can only be reached by considering and valuing the evidence in each particular case.

We have felt that it was quite extraordinary we could find such a close case on the facts as that of *Chicago, M. & St. P. R'y Co. v. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564, to support our position on this point. Coogan met his death underneath a train just as did Preston. Alongside the track was a pipe and its presence was asserted as negligence proximately causing Coogan's death. The inference that his death was caused on account of the pipe was urged because of a mark found on Coogan's shoe, which seemed to be regarded by counsel presenting the contention, as circumstantially sufficient to take to the jury the issue that Coogan had stumbled against the pipe and thence under the train. Analysis by this court resulted in the rejection of the contentions, and it was held that the railway company could not be required to pay damages on account of the death of Coogan.

It cannot be doubted that, without the indentation in the shell ballast, about which there is much testimony in this cause, there would not even be a pretense that the evidence is sufficient to take to the jury an issue that Preston's death was caused by the steel rail in question. Since we have shown from the evidence that the witnesses on the ground were themselves some-

what doubtful whether or not this was a heel print, and furthermore that, if a heel print, it could have been made by some one else than Preston, we are at a loss to understand how it can be argued in this cause that this indentation in the shell ballast supports the necessary inference. It certainly appears to be as devoid of probative force, as was the evidence in the Coogan case, *supra.*

This court, in a recent decision, makes it clear that evidence which merely suggests the possibility of an occurrence is not sufficient to take to the jury a fact issue on the subject. We refer to *General Insurance Company of America v. Northern Pac. R'y Co.,* 50 Sup. Ct. Rep. 44, 74 L. Ed. (Adv. Sheet No. 3), 97, in which it was sought, circumstantially, to prove that the railway company had set fire to a warehouse. The facts available, briefly, were that the warehouse was nearby the track and that a train had passed a short while before, emitting considerable smoke but there was no evidence of sparks. The possibility of the warehouse catching fire from other sources was open and it was just as plausible an inference that the fire could have occurred from other sources as from the locomotive. Accordingly, the insurance company was non-suited.

The case of *Myers v. Pittsburgh Coal Company,* 233 U. S. 193, cited by the Supreme Court of Texas, does not, we believe, support the position taken in respect to the evidence in this case. In the Myers case, one of the grounds of recovery was negligence on account of the coal company having failed to have an adequate lighting system. As a result, Myers was run over because the motorman could not see him after he had fallen. He was caused to fall by contact with a high powered wire which was a fact reasonably deducible

from the circumstances, there being no alternative inferences reasonably open. His contact with the high powered wire may also have been affected by poor lights.

As to the Issue of Abatement.

It has already been indicated that this suit was originally filed against the Director General on February 26, 1920, and that no effort at substitution was made until May 31, 1922. The Act of February 8, 1899, is copied in the appendix. (Appendix, p. 27.) This was a statute designed to prevent the abatement of certain actions. This statute has been held applicable by this court to actions by or against the Federal Agent appointed by the President to wind up the affairs of the United States Railroad Administration. In the case of *John Barton Payne, Director General, v. Industrial Board of Illinois,* 258 U. S. 613, 42 Sup. Ct. 462, certiorari brought by the Federal administration was dismissed for want of jurisdiction in a *per curiam* opinion, citing this statute and the case of *LeCrone v. McAdoo,* 253 U. S. 217-219. The applicability of this statute was recognized by Congress in passing the Winslow Act, amending the Transportation Act of 1920, which amendment became effective March 3, 1923. The Winslow Act is copied in the appendix. (Appendix, pp. 28-29.)

The first Federal Agent was appointed on March 11, 1920, Walker D. Hines being the appointee. He retired from this office and on May 14, 1920, the President designated John Barton Payne as the successor Federal Agent. He in turn retired and on March 26, 1921, the President designated James C. Davis as Federal Agent. Thus more than one year elapsed after the retirement of Walker D. Hines and

of John Barton Payne, who in turn held the position of Federal Agent, and yet there was no substitution. Furthermore, there was no substitution of James C. Davis until more than one year after his appointment and assumption of the duties of his office.

Under these circumstances, it is the contention of petitioner that this action abated. Certainly this is true unless the Act of March 3, 1923 (the Winslow Act), can be invoked to relieve the situation. But does this Act reach the situation? Petitioner contends that the action was not properly commenced because, under the terms and provisions of the Federal Employers' Liability Act, Mrs. Preston was required to bring her action as Administratrix, because her deceased husband met his death while engaged as an employe in furtherance of interstate commerce. No suit was brought by Administratrix until November of 1922. This was long after the lapse of two years prescribed in the Federal Employers' Liability Act and in the Transportation Act of 1920, and it is one of the provisions of the Winslow Act that it would apply only to actions "properly commenced" within the period of limitation.

It is said that the principle found in *M. K & T. R'y v. Wulf,* 226 U. S. 576, would be applicable. This holds that suit brought under the Federal Employers' Liability Act by the individual survivor can later be amended to sue by Administratrix, and that the original action would be sufficient to stop the running of the statute. It is also contended that it is the complete test of whether or not the action was "properly commenced" within the meaning of the Winslow Act, if it be determined whether or not it was brought in such form as to stop limitations. Petitioner

contends that such was not the purpose of Congress in requiring that the action be properly commenced, and that the requisites are not met unless the action shall have been brought in such form that all outstanding liabilities would be taken care of should judgment be entered upon the pleadings. This evidently was in mind when it was provided that substitution might be accomplished at any time prior to satisfaction of the judgment.

It does not appear that this court has passed upon exactly this point, that is to say, whether or not suit by an individual is sufficient within the meaning of this statute, when the suit properly should have been brought by Administratrix.

As to the Two-Year Period of Limitations.

Under the decision of this court in *William Danzer & Co., Inc., v. Gulf & S. I. R. Co.,* 268 U. S. 633, 45 Sup. Ct. Rep. 612, it cannot be doubted that the two-year period of prescription set forth in the Federal Employers' Liability Act and in the Transportation Act of 1920 reaches the right of action as well as the remedy. In that case this court construed Section 206 (f) of the Transportation Act, which provided that the period of Federal control should not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control. But it so happened that under the applicable statute of the State of Mississippi, and prior to the passage of the Transportation Act, the cause of action asserted by William Danzer & Company was barred if the period of Federal control should be in-

cluded in the period of prescription. An effort was made to invoke the provisions of 206 (f) of the statute, and this court held that such provisions could not be given retroactive effect upon a right of action already barred. In like fashion, petitioner presents that the Winslow Act cannot be given retroactive effect upon a cause of action already barred. Due to the abatement, which undoubtedly was accomplished under the statute of February 8, 1899, limitations reached this cause of action. When the Winslow Act was passed, therefore, the entire right of action had already passed out of existence.

Wherefore, because there was no sufficient evidence to take the cause of action asserted to the jury, because the cause abated and was not revived, and because following abatement the bar of the statutes of limitation prescribed the right as well as the remedy the several courts of Texas have erred to the prejudice of petitioner and relief is asked at the hands of this court

Respectfully submitted,

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Attorneys for Petitioner, James C. Davis, Federal Agent.

APPENDIX

An Act Entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, *C.* 121, 30 *Stat.* 822, *U. S. Compiled Statutes of* 1916, *Section* 1594.

No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs. (See brief, pp. 3, 6, 20, 23.)

Paragraph (a), Section 206, *Transportation Act of* 1920, *as Amended February* 24, 1922, *March* 3, 1923, *and March* 4, 1927, *U. S. Code, Title* 49, *Section* 74, 41 *Stat.* 461.

Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916), of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent

shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier; except that actions to enforce awards made by the Commission under the provisions of subdivision (c) against the agent so designated by the President may be brought within one year after the date of the Commission's award. (See brief, pp. 6, 20.)

The Winslow Act, Paragraphs (h) and (i) Section 206, *Transportation Act of* 1920, 42 *Stat. L.* 1443, *U. S. Code, Title* 49, *Section* 47.

Actions, suits, proceedings, and reparation claims of the character described in subdivision (a), (c), or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to enforce or

compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, from the time this subdivision takes effect. (See brief, pp. 6, 23.)

FILE COPY

Office Supreme Court
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No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

VS.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

MOTION FOR SUBSTITUTION

AND

SUPPLEMENTAL BRIEF FOR PETITIONERS

—By—

SIDNEY F. ANDREWS,
W. L. COOK,
Attorneys for Petitioner,
James C. Davis, Federal Agent.

McCURDY-YOUNG CO., HOUSTON

No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

MOTION FOR SUBSTITUTION

Andrew W. Mellon, Federal Agent, by his attorneys of record, moves the Supreme Court of the United States to enter an order substituting him for James C. Davis, Federal Agent, in order that the cause proceed for disposition in this court on its merits. Petitioner waives none of the matters presented in his brief.

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Attorneys of Record for the Federal Agent.

The undersigned counsel for respondent acknowledge receipt of a copy of the foregoing motion, and waive service thereof.

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Counsel for Respondent.

No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

SUPPLEMENTAL BRIEF FOR PETITIONERS

In course of the oral argument on January 23rd a question was raised by Mr. Justice Van Devanter concerning the probable application and effect of Section 11, subdivision (a), of Chapter 229, of the United States Statutes at Large, Volume 43, which was approved on February 13, 1925, and, by its terms, became effective three months thereafter. This is also found in United States Code Annotated, Title 28, Section 780, under the heading "Judicial Code and Judiciary." The language to which Mr. Justice Van Devanter had reference reads as follows:

> "Sec. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his

> official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

The question raised was whether or not, in view of the quoted language, the court was authorized to further consider the case on its merits, the doubtful point being as to jurisdiction. Andrew W. Mellon became Federal Agent under appointment of the President of the United States on January 1, 1926, succeeding James C. Davis in that position. If the statute were applicable and controlling, it is obvious that much longer than the six months allotted in its provisions would have elapsed and substitution in conformity therewith could not now be accomplished.

The court, however, has heard the argument in the case on its merits and has permitted the filing of a motion for substitution and of this supplemental brief touching the question above mentioned. In respect to the application and effect of the statute mentioned, and further in respect to the failure to have previously substituted Andrew W. Mellon for James C. Davis as Federal Agent, Petitioner respectfully presents the following suggestions:

The substitution Statute of 1925 above quoted is designated "An Act to Amend the Judicial Code, and to

further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes." The concluding paragraph of the statute, which is Section 14 thereof, reads as follows:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

Before calling attention to the history of this case chronologically, we wish to suggest that the quoted provisions seemingly were intended to regulate procedure in the Federal courts. This consideration may be of some importance in the further analysis of the problem. It should be noted, however, that the judgment of the Supreme Court of Texas was rendered on March 27, 1929. (R. 130-31.) Due to a typographical error in our brief, which was overlooked in the reading of the proof, we said that the judgment of the Supreme Court of Texas was entered March 27, 1928. The date, however, for the overruling of the motion for rehearing is correctly shown on page two of the brief. Since James C. Davis retired as Federal Agent and was succeeded by Andrew W. Mellon on January 1, 1926, it is obvious that there exists no right of substitution under either the Statute of 1925 above quoted, or under the Statute of 1899, which is quoted in our brief in the appendix. The 1925 statute permits substitution within six months after the retirement of the predecessor official and the 1899 statute authorized substitution within one year after such retirement. More than four years have elapsed since Andrew W. Mellon became Federal Agent. Sub-

stitution may be accomplished, if at all, under Section 206, paragraph (h) and (i) of Transportation Act, 1920, (42 St. L., 1443). See Petitioner's brief, pp. 28-29.

We respectfully submit, however, that the 1925 statute above quoted has no application because of the language of Section 14 thereof, which we have also quoted above. In considering the application and effect of this Section 14, it should be borne in mind that the Supreme Court of Texas had this cause before it from November 5, 1924, the date the writ of error was granted therein, until April 24, 1929, the date the motion for rehearing was overruled by it after judgment was rendered. (R. 130, 136.) Judgment, of course, had already been rendered by the District Court and by the Court of Civil Appeals, as shown by the record, and upon this consideration we invoke that portion of Section 14 which provides that the statute shall not affect "the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

With reference to the probable effect of the Statute of 1899, we have already presented our contentions. It is not assumed that this statute could possibly have the effect of depriving Petitioner of the right to be heard in this court on the issues tendered, except upon the possible hypothesis that the respondent procured no valid judgment in the trial court, due to a total lack of jurisdiction in that court under the effect of said Statute of 1899. If this is the opinion of the court and it is not inconsistent for the court to so indicate in its opinion, it might be of substantial assistance to the Federal Agent and his counsel in guiding their further

course in the handling of this and possibly other similar problems.

In respect to this Statute of 1899, the attention of the court is further called to the fact that the substitution of James C. Davis as Federal Agent was opposed in the trial court because it was too late. This consideration presented one of the important grounds on the appeal. The Texas courts have held in respect to this matter that further substitution than that accomplished was unnecessary and that the substitution which was accomplished was consistent with existing law. See the opinion of the Supreme Court on this subject (R. 134); also see the opinion of the Court of Civil Appeals on this subject. (R. 87-9.)

The provisions of what has been termed the Winslow Act were held applicable by the Texas courts. This Act is copied in the appendix to our brief on pages 28 and 29 thereof. Upon examination of this last mentioned statute, the court will note that it is specific legislation dealing with actions, suits, proceedings and reparation claims arising out of the Federal administration of railroads, being such as are described in previous subdivisions of the Transportation Act. The pertinent provisions of the Transportation Act, insofar as this particular cause is concerned, are subdivisions (a) and (d) of Section 206. See United States Code, Title 49, Section 74; also 41 Stat. L., 461.

Subdivision (a) provides for the prosecution of actions against the Federal Agent where, prior to Federal control, such actions could have been prosecuted against the Director General, and further provides a period of limitation of two years after the effective date of the

statute within which such actions may be filed.

Subdivision (d) reads as follows:

> "Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

If, therefore, the Winslow Act, being subdivisions (h) and (i) of Section 206 of the Transportation Act (42 Stat. L. 1443), can have application, it is because of the inclusion of this cause under either subdivision (a) or (d) of said Section 206, and because of the satisfaction of the provisions of the Act in respect to the time and manner of bringing the action originally. If it be assumed that the action was properly commenced within the period of limitation prescribed, as required by the provisions of the Act, and that said action was pending at the time the subdivision took effect, then, of course, subdivision (h), known as the Winslow Act, would have application and relieve the case of all embarrassment in respect to substitution. The statute plainly says that, those conditions being met, the action "shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office."

It is also provided in subdivision (i) that orders providing for substitution already made shall be validated, and that actions, suits, etc., of the character previously described, which have been abated or dismissed solely because of the provisions of the Act of February 8, 1899, shall be reinstated if motion therefor be filed within one year from the time the subdivision takes effect.

If this action were before the court with the positions of the parties reversed, that is, with Mrs. Preston as the petitioner, and the Federal Agent as the respondent, it would seem reasonable to say that a compliance with the conditions of subdivision (h) of Section 206, aforesaid, would permit the continued prosecution of the cause without the necessity of further substitution, except upon condition that substitution be accomplished prior to satisfaction of the judgment. It is difficult, if not impossible, to suppose that this statute could thus be invoked in behalf of the party holding the judgment against the Federal Agent in this cause, precluding the abatement of the action, and with the attitude of the parties reversed, not having the effect of allowing the Federal Agent, as petitioner, to proceed without the necessity of accomplishing some form of substitution.

Attention is again called to the fact that substitution was not possible within the periods prescribed by either of the Statutes of 1899 or of 1925, and that no other statute is applicable requiring such substitution.

Accordingly, it is respectullly submitted as our conclusion on this matter that the Statute of 1925 is not applicable, for two reasons, (a), because Section 14 thereof precludes its application, and (b) because under no hypothesis could there have been a compliance with the statute in face of the rulings of the courts of

Texas, holding that the substitution Statute of 1899 had no controlling effect, in view of the Winslow Act.

The Statute of 1899 was repealed by the Statute of 1925. See Section 13, Chapter 229, 43 Stat. L., 942.

A further consideration that should be mentioned is that the surety on the bond is a party to this cause. The petition for certiorari so indicates, although the signature was not in strict accord with the rules in this matter. The bond on petition for certiorari was omitted in the printing, but appears in the original record at page 192, and is a supersedeas bond and not merely a cost bond. It was the bond required by the Supreme Court of Texas in connection with the proceeding for certiorari. Perhaps the rights of the surety on the bond should be given consideration in connection with this problem. It might be the contention of the Respondent that the surety on the bond would have to pay the judgment, even though, under technical statutory rules, the Federal Agent could not be required to pay without some further litigation.

On the whole question, it is respectfully submitted that the cause should proceed to decision on the merits and in light of the considerations presented in our brief.

Respectfully submitted,

Sidney F. Andrews,

W. L. Cook,
Attorneys for Petitioner,
James C. Davis, Federal Agent.

The undersigned counsel for respondent acknowledge receipt of a copy of the foregoing supplemental brief, and waive service thereof.

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Counsel for Respondent.

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No. 188

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL,
Petitioners,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

BRIEF FOR RESPONDENT.

BY

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Attorneys for Respondent.

THE AMERICAN PRINTING COMPANY, GALVESTON, TEXAS

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No. 188

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL
Petitioners,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

AS TO THE ISSUE OF PROXIMATE CAUSE.

For convenience, petitioners will be referred to as defendant and respondent as plaintiff.

Three courts have passed on the point here presented. The case was tried before Hon. J. D. Harvey, who has since been elevated to the Commission of Appeals of Texas. The judgment of the trial court was affirmed by the Court of Civil Appeals, the opinion being reported as Davis, Agent, v. Preston, 264 S. W. 331. The opinion of the Supreme Court is in 16 S. W. (2) 117.

Since the opinions of the Court of Civil Appeals and the Supreme Court show the facts rather fully, we will not again restate the evidence except so much of it as may be found necessary in answering defendant's brief.

In the Court of Civil Appeals defendant conceded and the court found that it was a negligent act to have left the rails on the switch yard. It is, in effect, conceded here that this was negligence.

Plaintiff made out her case by taking and introducing in evidence the depositions of Moore (R. 40-50), McCloud (R. 50-55) and McDaniel (R. 55-58), members of the switching crew. Moore also testified in person as a defense witness (R. 60-71). McDaniel was also called to testify in person (R. 71-74).

In defendant's brief it is sought to have the inference drawn that "there was some doubt as to whether it was a heel print." To support this contention isolated extracts are copied from the evidence of McCloud, McDaniel, Quarles and Morris. Plaintiff respectfully submits that when the evidence as a whole is considered the fair inference to be drawn is not only that it was a fresh heel print, but was such as would have been made by a switchman in alighting from a moving train. There is a great deal of evidence in the record as to the heel or foot print, its location and appearance. When Moore's deposition was taken by plaintiff in 1919 (R. 67) he testified:

> "I found a heel print there but I could not swear it was Preston's. From looking at it, *it looked like it had just been made.* The rain falling that night would not have wiped out an impression that deep down even thought it had been made sometime before, water going into the print, you know."

While McDaniel testified at the trial that "I could not swear it was a heel print," when he testified by deposition shortly after the accident he said:

> "I saw a foot print with the others there that night close to the McKinney Street crossing on the left hand

side of the track, I judge possibly three or four feet from the McKinney Street crossing. There were two rails between the two tracks that night, they were between the two main line tracks. I don't know how far it would be from the line of the coach to where the rails were, but about the middle of the track, not over 18 inches of the outside. The end of the rail next to McKinney Avenue was, I suppose, about four feet from the McKinney Avenue crossing. We found what looked like, somewhat like a heel print there in the shell; *it seemed to be fresh.* I don't know, but it was about eighteen or twenty inches I guess, something like, from the end of those loose rails. . . .

"This foot print in the shell was in the usual and customary place for the long field men to get off the train going down there; it was just about the right place to get off on a paved street there." (R 56-57)

Just after Preston's hat and lantern were found the witnesses examined and discussed the heel print among themselves. On this point defense witness Morris said:

"My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two main line tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh and *we supposed it to be the heel mark where he lit; that was the supposition. They all thought it was where Mr. Preston got off of the coach.* I don't think there was anybody saw that man get off. . . . It was usual for the end man to get off there. I could not say there was any peculiarity about that heel mark that would have prevented it from being made by some one else; the only thing about the track was, *it looked fresh;* I probably wouldn't know the difference between that and one made a half hour before; I don't suppose I could define any difference between such a mark and one made an hour before." (R 78)

Other evidence on this point is set out in the Court of Civil Appeals' opinion. The evidence was adequate to establish not only that it was a fresh heel print, but one deep enough and such as would have been made by a switchman alighting from a moving train.

In defendant's brief extracts are copied from the testimony of Moore and Quarles from which it is sought to have the inference drawn that the heel print might have been made by some one other than Preston. It could not have been made by one walking along McKinney Avenue, because it was according to some of the witness twelve to twenty feet off of the planking or pavement of McKinney (R 79) and was parallel with the outbound main track which crosses McKinney (R 67). It was a stormy night, with the rain falling; the heel print was fresh; and was in ordinary mudshell ballast. Preston got off at this particular place only a few minutes before it was found. If the heel print had been made any considerable time before the accident, it would not have had the appearance of being fresh under the weather conditions that prevailed. The hat and lantern were found opposite the heel print and about the same distance from McKinney Street (R 79). It is surmise to say that some one else made this fresh heel print. It does not appear that anyone else was along there immediately before Preston fell.

In defendant's brief he says it is noticeable that Preston's body was found not on the left side of the track on which the train was moving but on the right hand side thereof, making reference to Moore's evidence, pages 61 and 62. While Moore did say the body, when found, was closer to the right rail on the outbound main, McCloud said it was in the middle of the track (R 52). The body was dragged several hundred feet and struck on the Milby Street crossing (R 52). In defendant's brief it is sought to have

the inference drawn from Moore's evidence that Preston might have gotten off on the right side of the train. When Moore's deposition was taken shortly after the accident, he said Preston got off on the left side (R 43). McCloud testified by deposition:

> "As near as I remember, on that particular night we got off from the left hand side; Preston did too. The vestibule would be open on that side, too. My impression is he got off. That is the side on which I looked for tracks that night." (R 54) . . . . "The left side is where it is customary for a man to get off." (R 55)

McDaniel, on this point, testified:

> "Preston was a long field man. When we got to McKinney Street crossing it was his duty to protect the cars and the track in shoving the train through. They generally get off there at McKinney Avenue and see that they don't catch nobody on the crossing. He got on what we call the north side, I suppose, of the train when we left the Union Station; that was the left side going out. The vestibule was open where we got on. I never noticed whether all the vestibules were open, I got on at the head end and walked through. Preston must have got off at the McKinney Street crossing on the left hand side next to the rip side, because he was going to shove off on the rip track. That would have been the usual and customary place to get off. I know he got on there at the Union Station, on that side. I don't know which way they went in. I got on the first coach, second class car, I don't know whether he got on the hind end or next to the hind end. That is the side they let passengers out, the platform side. Those vestibules would naturally be open, the others would be closed. In going out I was next to the rear coach. Preston was in the same coach with me." (R 55-56)

In defendant's brief it is said "there is some confusion as to where" the hat and lantern were found. The fair inference from the whole evidence is that the hat was found opposite the place where the heel print was located and approximately the same distance from McKinney Street. The excerpts defendant has quoted from Moore's evidence on this point are of no moment because he did not know where they were found. There are other witnesses, however, who did know the facts. McDaniel deposed that he saw them pick up the lantern and that it was across the inbound main line and about ten or fifteen feet from McKinney Street crossing (R 56). The watchman who picked up the hat, he says, "brought it over to us across the main line. He came from the main line clear across the track," meaning the inbound main, which was the track adjacent to the outbound on which the coach was when he fell (R 56).

The witness Quarles, who picked up the hat, said:

> "When I picked up the hat I was not thinking about anything, you know, and I just thought his hat had blowed off and I am not clear on just where I found the hat unless it was between the tracks of the inbound main, but I think, the best that I can remember is, in between the tracks of the inbound main; that is the best I can recall . . . I was riding on the rear car; I got off of the rear end; I walked towards McKinney Avenue, right towards the watchman's shanty; it was in going there I picked up this man's hat; the best I can recall it was between the inbound main." (R 75)

Defendant, in his brief, based on Moore's evidence, seeks to have the inference drawn that Preston, in the line of his duties that night, should have gotten off some 110 feet beyond McKinney Avenue in order to make a car coupling. The preponderance of the evidence is that he did not get off of the train for that purpose, but in order to flag or protect the McKinney crossing when these coaches had been

backed on the rip track where they were to be stored. The evidence is that they slowed up for the McKinney Street crossing so he could get off at the place to perform this duty, rather than to make a coupling. In any event, the evidence clearly established the fact that he did get off, not 110 feet from McKinney, but at the place where his hat and lantern were found.

The case was submitted to the jury on special issues. The jury found that defendant negligently left the loose rails on which Preston stumbled; that he did not assume the risk and that it was not an inevitable accident; that his death was not caused by the force of the wind; or by the vestibule door falling against him, causing him to lose his balance; or by the fact that the handhold on the car was wet, causing him to slip and fall; or that he did slip on the wet boards of the McKinney Street crossing; or that his having on a raincoat, coupled with the fact that a gale was blowing toward the train on the side from which he attempted to alight; or the fact that he had on gloves, coupled with the further facts that the handhold from which he was alighting was wet, and that a strong gale was blowing toward the train, causing him to slip his hold and lose his balance; or by the rain, causing him to slip, coupled with the fact that a violent wind, in gusts, was blowing towards the side of the train from which he attempted to alight; or that his raincoat caught on some part of the vestibule door or other part of the coach from which he was alighting. (R 23-32)

ARGUMENT.

Could a jury reasonably conclude from the facts that Preston met his death from tripping over one of the loose rails? If reasonable men could differ as to whether this was a proximate cause, the evidence is sufficient. Kreigh

v. Westinghouse & Co., 214 U. S. 249, 53L, Ed. 984; Baltimore & Ohio R. R. v. Griffith, 159 U. S. 603; Cartwright, et al, v. Canode, 106 Tex 502, 171 S. W. 696. In determining this question the testimony must be viewed in its most favorable aspect to plaintiff. Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906.

When the evidence is considered in its most favorable aspect, it is fairly deducible that Preston got off of the moving coach on the left hand side, where the steel rails had been negligently placed, and that he was caused to fall at the point where one of the rails was located. It is clear, too, that the rail, located a foot or two from the coach steps, was something reasonably calculated to trip a switchman getting off of a moving train on a stormy night.

Did he trip on the rail? The train crew that night, after the hat and lantern were picked up, found a fresh, deep, heel print about a step from the end of the rail. This was a few minutes after he was killed. Following the finding of the heel print there was discussion of that circumstance, and Morris, defendant's witness, says, "We supposed it to be the heel mark where he lit," and, further, "they all thought it was where Preston got off." This discussion was had and this conclusion reached by experienced switchmen at the time and while they were trying to determine why Preston was caused to fall. It was a part of the res gestae. It was the only explanation of the accident that was considered by the train crew that night.

The train had slowed down for him to get off at or about the point where the hat and lantern were found, and which was the usual and customary place for the long field man to alight. The fact that his hat and lantern were found so soon after the accident, located just opposite the end of the rail, is, without considering the heel print, enough to show that he fell at that point. The heel print, however, taken

in connection with the location of the hat and lantern, show that he tripped against the rail. All of these facts are consistent with each other and with the fact that he did trip on the rail. Taken together they coincide with and account for his death. They lead to a reasonable and satisfactory conclusion.

Plaintiff did not have to show that Preston's stepping on the rail was the sole and only cause of his death, but only that it was a co-operating cause. A case is made if she has shown that one of the causes of her husband's death was this act of negligence. The rule is stated with clearness by Mr. La Batt in his work on "Master and Servant":

> "When several causes concur to produce certain results, any of them may be termed 'proximate,' provided it appears to have been an efficient cause. The general rule applicable to all cases illustrating this situation, except those in which the contributory negligence of the servant himself is involved (see Sec. 1577, ante), is that, in order to establish the right of action, it is merely necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good whether the other causes were also defaults for which he was responsible, or were due to some event or some conditions for which he was not required to answer." Vol. 4, p. 4784.

This doctrine has been applied and the liability of the master affirmed where his negligence has concurred in causing injury to the servant with the following agencies: (a) Negligence of a fellow servant. La Batt, Section 1581; (b) Negligence or wrongful act of some third person. La Batt, Section 1580; (c) Negligence of an independent contractor; (d) A risk assumed by the servant; (e) acts of God or inevitable accidents. These cases illustrate the application of the rule that where the negligence of the master

has concurred with some other agency for the operation of which he is not responsible in causing the injury to the servant, the master is liable. It may be that Preston was handling himself with difficulty at the time on account of the slippery steps, the high wind, the long raincoat, wet hand holds, etc. It is probable that a switchman would be more likely to stumble on a rail like that in question on a dark, rainy night than he would on a clear day, but this only makes more culpable the negligence in leaving the rail where it was, because on such a night switchmen need more protection than at ordinary times. It makes no difference in determining the liability of the master whether these other causes were defaults for which he was responsible or not. It is enough if defendant's negligence has concurred in causing Preston's death with any one of the agencies that it is urged might have also had something to do with his stumbling and falling. Being an experienced switchman, the presumption is indulged that he exercised ordinary care for his own safety at all times. If he did not, it was necessary for defendant to allege and prove some act of contributory negligence. None was alleged, none was proven, and none, we submit, can be presumed; but, on the other hand, the affirmative presumption will be indulged that he at all times exercised ordinary care for his own safety.

The Court of Civil Appeals made an apt summary when it said:

> "Therefore it may be conceded that all the facts in evidence surrounding the death of Preston were contributing causes to his death, if the evidence raises a reasonable probability that the rail constituted one of the contributing causes, the jury's verdict must be sustained. And what is there against that inference? Preston fell under the cars. He alighted from the coach at a place, and under circumstances, to show he

might have tripped over a rail. The heel mark shows he was bodily near the rail. In stumbling over an obstacle, it seems to us more reasonable that he would have dropped his lantern than if he had been driven under the coach by the wind. An inference that he stumbled over the rail does violence to no fact in the case, but is in complete harmony with all other facts. In indulging that inference, the jury could have given due weight to the fact that it was raining, that the wind was blowing, that the deceased had on a long raincoat, that the hand holds were wet, etc., but to find that one of these causes was the sole and exclusive proximate cause of the death of Preston would require the jury to discard all evidence in regard to the rail, and to minimize the location of the heel track, and the hat and lantern. A verdict in harmony with all the facts seems to us more reasonable than one in harmony with a portion of the facts, and against other facts."

If plaintiff has produced evidence from which it may be reasonably inferred that the death of her husband proximately resulted from the negligence of defendant, then she has sufficiently explained the cause of the accident. Her case will not be condemned merely because she has failed to exclude every other hypothesis. To hold that plaintiff was required to exclude the probability that the accident might have occurred in some other way would impose on her the burden of establishing her case beyond a reasonable doubt. She is only required to establish it by the preponderance of the evidence. Boch v. Fellman Dry Goods Co., 212 S. W. 635 (Tex. Sup.); Lunde v. Packing Co., 117 N. W. 1068; Ry. v. Wood, 72 Pac. 215; Settle v. Ry., 48 Am. St. Rep. 635; Burk v. Ry., 109 Pac. 1087.

Chicago M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, relied on by defendant, is not in point. Stating it shortly, all plaintiff showed in that case was that Coogan was killed, presumably while attempting to couple the air hose in a train at a point where the railroad had negligently permitted an air pipe along the track to remain bent. It was held

that the mere fact of his being killed under the circumstances did not show that his foot was caught under the bent pipe, and, further, that the mere presence upon the counter of his shoe of a mark discovered several days after the accident with nothing to show when or how it was made and with no care to preserve the shoe in the same condition as it was when the accident occurred did not supply the hiatus in the proofs. That is a case where circumstancial evidence was relied on with a failure to prove adequate circumstances by direct evidence; the jury was permitted to go beyond the field of probabilities and enter the realm of conjecture.

In the case at bar the circumstances upon which the inference is drawn that Preston tripped on the rail are established by direct evidence. It is established by direct evidence that he got off of a moving train at the point where the rail was located. The train slowed down at McKinney Street when he left the coach and he was seen to pass out of the coach for the purpose of getting off at that place (R 42-43). It is established by direct evidence that he did alight at that place and fall, because his hat and lantern were found at that point. It is established by direct evidence that a fresh, deep heel print was made at that point in the shell ballast such as a switchman would make in alighting from a moving train. It is established by direct evidence that this heel print was in such close proximity to the end of the rail as to cause him to trip over the rail when he took the next step. It is established by direct evidence that he was caused to fall under the train from the fact that pieces of his clothing were found along the track. When we consider the number, the independence and the consistency of these component circumstances established by direct evidence, they have adequate probative force to establish the one inference that he tripped on the rail. We respectfully submit that circumstances of no greater probative force were held

adequate in Myers v. Pittsburgh Coal Co. and New York Central Ry. v. Capinsky, cited and relied on by the Supreme Court of Texas. The general principles applicable to the case at bar are illustrated and elucidated by the following analogous cases, in each of which jury verdicts on circumstancial evidence were upheld:

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 34 Sup. Ct. 539, 58 L. Ed. 906, reversing 203 Fed. 221;

Union Pacific Railroad Company v. Huxoll, 245 U. S. 535, 62 L. Ed. 455, 38 Sup. Ct. 187;

Gray v. Davis (CCA 1st) 294 Fed. 58;

Taber v. Davis (CCA 2nd) 280 Fed. 612;

New York Central Railroad Co. v. Capinski, 249 Fed. 346 (CCA);

Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290;

Settle v. Ry., 48 Am. St. Rep. 635.

A jury, in a civil case, is within its province as long as it seeks the truth within the field of the evidence to the utmost boundaries of reason which rational men of common sense might set. It is prohibited from passing beyond the line which separates the field of probabilities from the realm of conjecture.

AS TO THE ISSUE OF ABATEMENT.

Preston was killed on September 15, 1919. Five months later (February 26, 1920) suit was filed against Walker D. Hines as Director General of Railroads (R 2). The summons or citation was duly served the next day (R 7). The suit was, therefore, commenced while the Federal Control Act of August 26, 1916, was in effect, and, that being

Leap Year, three days before the Transportation Act of 1920 took effect on March 1, 1920. On May 31, 1922, an order was made granting the right to substitute Jas. C. Davis, Federal Agent, as defendant in the place of Walker D. Hines (R 10) pursuant to which, on November 27, 1922, an amended petition was filed in which Jas. C. Davis was named as defendant (R 12).

The suit having been properly commenced against the Director General of Railroads three days before the termination of Federal control, the following provision of the Transportation Act of 1920 applies:

> "Sec. 206 (d)—Actions, suits, proceedings and reparation claims, of the character above described, pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

With slight change, this is now U. S. Code, Title 49, Sec. 74 (d).

When this Act took effect on March 1, 1920, many litigants, like plaintiff, believed that substitution of the Federal Agent for the Director General in such pending suits might be made at any time because it will be noted the Act does not provide that the substitution should be made within any given period. In any event, it was not generally believed that the Act of February 8, 1899, had application to suits pending, whether brought by or against the Director General, until Payne v. Industrial Board, 258 U. S. 613, 66 L. Ed. 790, was decided on May 1, 1922. This per curiam opinion dismissing a petition for certiorari for want of jurisdiction has been generally construed as holding that the Act of February 8, 1899, had application to suits that had been brought against the Director General. As a re-

sult of this decision many suits would have abated, since the Director General had cases in behalf of the Government and there were many like the case at bar pending against the Director General in which substitutions had not been made within a year as provided in the Act of February 8, 1899. Congress was appealed to and in order to relieve the situation, on March 3, 1923, passed the Winslow Act as an amendment to the Transportation Act of 1920. This Act is now, with slight change, U. S. Code, Title 49, Section 74 (h. i.).

The purpose of the Winslow Act was to repeal the enactment of February 8, 1899, insofar as it affected suits brought by or against the Director General or Federal Agents and in lieu thereof to prescribe a different method and time in which to make substitutions in order to prevent the abatement of suits involving these officials. The Act, in terms, not only validated all substitutions theretofore ordered, without regard to the time when made, but revived all suits that had abated or been dismissed because of the provisions of the Act of 1899. Under the Winslow Act limitation does not run against the right to substitute, except that it must be done before the satisfaction of final judgment. The broad purpose of the statute was to prevent the abatement of suits because of the change of these officials, and the failure to make substitutions within a year. It was a remedial statute designed to prevent a miscarriage of justice through the failure to make a formal substitution that in no way affected the rights or liabilities of litigants. Congress recognized that the mere substitution of a Federal Agent for the Director General, or the substitution of one Federal Agent for another, was a mere matter of form and that the time when it was done was of no importance. It is clear that such agents are only formal representatives of the Government in these suits and do not appear as in

actions of a personal character brought by or against department heads and other officers.

The question presented is, what is meant by the term "properly commenced" as used in the Winslow Act? It is asserted that the action was not properly commenced because under the Federal Employers' Liability Act Mrs. Preston was required to bring her action as administratrix because her husband met his death while engaged as an employee in the furtherance of interstate commerce. Since Preston was a switchman for Houston Belt & Terminal Company, a local Terminal Company, it was thought he was engaged in intrastate commerce. It developed, however, that the particular cars they were switching were a part of an interstate train from Chicago and were being set out at Houston, Texas, because a storm was brewing (R 60). Because of this fact the Employers' Liability Act applied and not the Texas Death Statute, under which Mrs. Preston could have recovered individually. In order to meet this issue that arose during the trial, the court permitted Mrs. Preston in her capacity as administratrix to be substituted as plaintiff, as is required by the Employers' Liability Act.

The decision by this Honorable Court cited in the opinion of the Supreme Court of Texas hold that a new cause of action was not thereby introduced and that the suit was not barred by the statute of limitations because of this substitution, even though it was made more than two years after Preston's death. In New York C. & H. Ry. Co. v. Kinney, 260 U. S. 340, some 7½ years after the suit was begun plaintiff was allowed to amend and allege that the cause of action arose under the Employers' Liability Act.

It is clear that if all substitutions of the succeeding Federal Agents had been made in due time as they were ap-

pointed, no objection could be raised under the decisions of this court and the Supreme Court of Texas to substituting Mrs. Preston in her representative capacity. This being so, it is untenable to urge that the words "properly commenced" have the effect to prevent the Winslow Act from operating to validate the order substituting the Federal Agent for the Director General. The substitution of the Federal Agent for the Director General, or rather the validation of the lower court's order, by the Winslow Act, applying as it does to the defendant, is neither affected by nor does it affect the decisions in respect to her appearing as administratrix instead of individually. They are separate and distinct matters and are not dependent one on the other. The evil Congress was legislating against in the Winslow Act was the statute of 1899 requiring the substitution of Government Agents within a year. It was not intended to disturb the wholesome doctrine announced in decisions like Reading Co. v. Koons, 271 U. S. 62, 70 L. Ed. 837.

The Winslow Act protects three classes of suits from abating, to-wit, those described in subdivisions (a), (c) and (d) of Section 206 of the Transportation Act. The suit at bar is in Class (d). In providing for the substitution of the Federal Agent at any time before satisfaction of final judgment in these three classes of suits, *"properly commenced within the period of limitation prescribed,"* it meant that they must have been duly and seasonably commenced within the period of limitation. It has reference to the time of commencing suits and to the defendant. In any event, it was not improper for plaintiff, under the circumstances, to commerce her suit as she did, as is aptly pointed out by the Supreme Court of Texas in its opinion.

AS TO THE TWO-YEAR PERIOD OF LIMITATIONS.

Defendant, in his brief, contends that the suit abated by force of the statute of February 8, 1899, before the Wins-

low Act was passed, and that this latter enactment was ineffectual to revive it. The argument is that because the Federal Agent was not substituted for the Director General within the year permitted by the Act of 1899, the cause of action was effectively destroyed and it could not be revived by the Winslow Act. The reasoning is that the Winslow Act can not be given retroactive effect in a cause of action that had abated. Two questions are presented: Did the Act of 1899 have the effect of destroying plaintiff's cause of action before the Winslow Act was passed, and, if so, did Congress have the power to revive it by validating the order of substitution made by the trial court? Both questions were answered, in Dougherty et al v. Payne, Director General, 291 Fed. 60 (CCA Fifth Circuit) where the court held that a failure to have Jas. C. Davis substituted as Agent from March 26, 1921, the date of his appointment, until the date of the motion to dismiss for failure to make him a party, filed on February 23, 1923, worked no abatement of plaintiff's case in view of the Winslow Act, providing for the reinstatement or revivor of suits that had abated or had been dismissed pursuant to the Act of 1899; and in the same case, on the merits (291 Fed. 61) held that the Florida two-year statute of limitations was unavailing where it appeared that the suit, when brought, was not barred, the court using the following apposite language:

> "Moreover, this suit was properly brought against the Director General then in office, and by amendment his successor was substituted. No substitution of the present Agent was made, but the suit was still pending when the Act of March 3, 1923, amending section 206a, was passed. No new cause of action resulted by the mere substitution of one individual for another in the office of Agent or Director General. We are therefore of opinion that the amendment of 1923 did not violate the state statute of liamitations." (Page 62)

But even if the Act of 1899 permitting an abatement had the effect of destroying the cause of action, surely Congress

had the power to revive it insofar as the liability of the Government was concerned.

Danzer & Co. v. Gulf & S. I. R. Co., 268 U. S. 633, 69 L. Ed. 1126, does not control or affect the decision of the case at bar for two reasons: (a) In that case the cause of action had already been barred by the statute of limitations before the suit was commenced and before the Transportation Act, Sec. 206 (f), was passed, while in the case at bar the suit was filed five months after Preston's death and was pending when the Winslow Act was passed; and (b) that was a suit between private citizens while in the case at bar the Congress merely validated an order substituting one Federal Agent for another and which affects only the liability of the United States. Surely Congress was authorized to revive a suit against the Government, even if it had abated.

Wherefore, plaintiff prays that the judgment be affirmed.

Respectfully submitted,

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No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

v.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

SUPPLEMENTAL BRIEF FOR RESPONDENT ON MOTION FOR SUBSTITUTION

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McCURDY-YOUNG CO., HOUSTON

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SUPPLEMENTAL BRIEF FOR RESPONDENT

In the first place, respondent begs leave to join in the motion for substitution filed herein by petitioners, and in support of their joint request submits the following:

Respondent agrees with petitioners that the 1925 statute, to which Mr. Justice Van Devanter called attention on oral argument, does not operate to prevent substitution at this time, and concurs in all the views expressed by counsel for petitioners as grounds for such position, save such, if any, as presented in the supplemental brief for petitioners as might militate against the position of respondent that none of the grounds urged by petitioners for abatement of respondent's action, or which sought to interpose limitations thereto, are sound and well taken; and in addition to the grounds

urged by petitioners in their supplemental brief in support of their motion for substitution at this time, respondent presents the following:

I.

Proposition 1.

Sec. 11, subdivision (a) of Chap. 229 of the United States Statutes at Large, Volume 43, approved February 13, 1925, and now constituting Section 780 of Title 28 of the Judicial Code as contained in the United States Code Annotated, is a general law, governing causes of action generally, whereas the Winslow Act, paragraphs (h) and (i), Section 206, Transportation Act of 1920, 32 Stat. L., 1443, United States Code Annotated, Title 49, Section 74, effective March 3, 1923, is a special Act governing substitution in cases arising under the Transportation Act, and not being expressly repealed by the former general Act, remains unaffected thereby, and continues to control the disposition of this case in the matter of substitution.

Statement.

At the risk of appearing a trifle pedantic, for the convenience of the court, we file the following chronological statement of the statutes under consideration, which may be helpful to the court in passing not only on this motion for substitution, but on the general questions affecting the regularity of proceedings on the other questions raised by petitioners involving an asserted abatement and the bar of the statute of limitation.

Article 1594, United States Compiled Statutes of

1916, and being known as the Act of February 8, 1899, is as follows:

> "No suit, action or other proceeding lawfully commenced by or against the head of any department or Bureau or other office of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may take such order as shall be equitable for the payment of costs."

Subdivision (d) of what is known as the 1920 Transportation Act, passed February 28, 1920, Chapter 91, Section 206, 41 Stat. L., 461, and being subdivision (d) of Section 74 of Title 49 of the United States Code Annotated, is as follows:

> "(*d*) *Abatement of Actions.* Actions, suits, proceedings, and reparation claims of the character above described pending on February 29, 1920, shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a) of this section."

Subdivisions (h) and (i) of Section 74, Title 49, and constituting what is known as the Winslow Act, effective March 3, 1923, Chapter 233, 42 Stat. L., 1433, are as follows:

> "(*h*) *Effect of death, etc., of director general, or of public officer bringing suit arising out of Federal control.* Actions, suits, proceedings, and

reparation claims, of the character described in subdivision (a), (c), or (d) of this section, properly commenced within the period of limitation prescribed, and pending on March 3, 1923, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a) of this section, but may (despite the provisions of Section 780 of Title 28, Judicial Code and Judiciary), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. Nor shall any action, suit, or other proceeding brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of Section 780 of Title 28, Judicial Code and Judiciary), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

"(*i*) *Substitution of parties validated.* Orders providing for a substitution in such cases made before March 3, 1923, by courts having jurisdiction of the parties and subject matter are validated, anything in Section 780 of Title 28, Judicial Code and Judiciary, to the contrary notwithstanding."

Section 11, subdivision (a), Chapter 229, U. S. Stat. L., Volume 43, approved February 13, 1925, and now constituting Section 780 of Title 28 of United States Code Annotated is as follows:

"Sec. 11. (*a*) That where during the pendency of an action, suit, or other proceeding brought by

or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a territory of an insular possession of the United States, or of a county, city, or other governmental agency of such territory or insular possession, and relating ot the present or future discharge of his official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

Section 13 of the foregoing Act approved February 13, 1925, carries the repealing clause, and a careful checking of the statutes therein expressly repealed fails to disclose a repeal of the Winslow Act approved March 3, 1923, subdivision (h) and (i) of Section 74, Title, 49, United States Code Annotated set out *supra,* but does include the following general repealing clause: "All other Acts and parts of Acts insofar as they are embraced within and superseded by this Act or are inconsistent therewith."

Authorities and Argument.

In such a situation as is disclosed by the above statement it is claimed by respondent that the following from Volume 26 of Am. & Eng. Enc. of Law, (2nd Ed.), subject "Statutes," page 739 *et seq.* has complete and full application:

"It is a canon of statutory construction that a

later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a persumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. This rule, however, is not one of positive law, but of construction only, adopted to settle legislative intent in the absence of words declaring such intent.

"**The Reason** which has been given for this rule is that in passing a special Act the legislature has its attention directed to the special case which the Act was made to meet, and considers and provides for all the circumstances of that special case; and having done so it is not to be considered that the legislature, by a subsequent general enactment, intended to derogate from the special provision previously made where it was not mentioned in such enactment."

The foregoing text is so generally and universally supported by authorities in the appended notes thereto, that it is not thought necessary to cite supporting authorities, but for the convenience of the court the following few of its own decisions are given:

Furman v. Nichols, 8 Wall. 44, 19 L. Ed. 370.
State v. Stoll, 17 Wall 425, 21 L. Ed. 650.
Cass County v. Gillett, 100 U. S. 585, 25 L. Ed. 585.
Louisiana v. Taylor, 105 U. S. 454, 26 L. Ed. 1133.
Ex Parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. 396.

Chew Heong v. U. S., 112 U. S. 536, 28 L. Ed. 770, 5 Sup. Ct. 255.
Rodgers v. United States, 185 U. S. 83, 46 L. Ed. 816, 22 Sup. Ct. 582.
Joehanson v. Washington, 190 U. S. 179, 47 L. Ed. 1008, 23 Sup. Ct. 825.

The foregoing authorities all reiterate the elemental rule that implied repeals are not favored, and are never sanctioned if two Acts can stand together, and that a former law is never repealed by a later one only when harmony is impossible; and to a like effect see 26 A. & E., 721; 25 R. C. L., page 918, Section 169.

Within the purview of the rule above set out is the following from 36 Cyc., 1092, subject "Statutes":

> "A subsequent statute which is general does not repeal or abrogate a former statute intended to operate upon a particular subject[8], or for the benefit and relief of individuals[9]."

Note 8, shown in the text is supported by Trausch v. Cook County, 147 Ill. 534, 35 N. E. 477; and a later running down of subsequent annotation discloses the following later cases:

Witt v. Shelton, 240 Fed. 8 (C. C. A., Eighth Crt.), 265.
Birmingham v. Southern Express Co., 164 Ala. 529, 51 Southern 159.
Pepper v. Horn, 73 Southern (Ala.), 46.
Renner v. State, 182 Ind. 394; 106 N. E. 703.
McNeil v. Kingsbury, 190 Calif., 406, 213 Pac. 50.
Western Shore Lumber Co. v. Riley, 192 Calif. 144, 218 Pac. 761.

II.

Force is added to the foregoing contention in this case when it is considered that it is extremely doubtful

if the Act of 1925 applies at all, and for that matter as to whether the Act of 1899 applies.

Section 11 of the 1925 Act as also the 1899 Act applies to actions brought by or against an officer of the United States "and relating to the present or future discharge of his official duties." This, it would seem, was intended to cover survival of actions of a personal character against officers and department heads and not suits involving government liability.

The suit at bar against the Director General and the successor agent did not relate to the *present* or *future* discharge of his official duties."

In construing the Transportation Act it should be looked on as a whole, in order to determine the status of the Director General and Federal Agent, and when thus considered it will be noted that Section 206-a of the Transportation Act, Code Title 49, Section 74-a provides that suits might be brought against the Federal Agent to be designated by the President "for such purpose." In other words, he is an agent created for the purpose merely of having some one in whose name the action may be carried on in order to determine government liability. These agents do not have or discharge any official duties; they are purely figure-heads set up for the purpose of being sued in order to determine the government's liability.

The judgment against such Federal Agent, under subdivision (e) of Section 206 of the Transportation Act are required to be paid out of the revolving fund created by Sec. 210 of the Transportation Act, which is a government fund. Clearly, this is an action to determine governmental liability as distinguished from the survival of a cause of action of a personal charac-

ter. There is not a single official duty enjoined on employes of the carriers, and the fund out of which judgments are paid are not administered by the Federal Agents in their official capacity. In other words, the principal point is that there is a fundamental difference between a suit of a personal character against an official for things that he has done and one against an agent set up merely for the purpose of being sued.

Unless this contention is foreclosed by the *per curiam* opinions of this court in Payne v. Industrial Board, 258 U. S. 216, 66 L. Ed. 790 (citing LeCrone v. McAdoo, 253 U. S. 217, 64 L. Ed. 869, 40 Sup. Ct., 510) and United States Railway Administration v. Slatinka, 260 U. S. 747, 43 Sup. Ct. 247, 67 L. Ed. 494, it would seem to find support in reason and principle, and is directly supported by the following decisions from State courts:

DeWitt v. N. Y. C. R'y Co., 196 N. Y. S. 870, 198 N. Y. S. 542, 909.

Toothacher v. Hines, 112 Kan. 304, 210 Pac. 110.

See also:

Hill v. Davis, 257 S. W. (Tex.), 340.

Miekle v. Hines, 263 S. W. (Tex.), 1078.

Kilgore v. Hines, 265 S. W. (Tex.), 744.

As to the difference between suits of a personal character and one involving government liability, see also 1 C. J. 146, Section 230, and thereunder Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 766, 46 L. Ed. 1070.

If the court finds it necessary in the disposition of the motion under consideration, to reach the contention made here, it might with profit re-examine the *per curiam* Payne and Slatinka cases, and determine how far the court meant to go in those cases in a disposition of the grounds urged *supra* to the applicability of the 1899

Act to cases arising under the 1920 Transportation Act, and whether it is willing to make further extension of LeCrone v. McAdoo to the question that has arisen herein under the 1925 Act.

We might add, as contended on oral argument, that it would not seem that it was ever intended that the 1899 Act had any application, because if Congress had intended that it should be looked to at all, it would have been as a whole; and since it provided that suits against certain government officials *should not abate* if substitution was effected in twelve months, and if Federal agents and suits against them under the Transportation Act setting them up were intended to be governed by the 1899 statute, it was unnecessary for Congress to insert at all subdivision (d), in the Transportation Act, providing against abatement, and having specially inserted it, it must be presumed that Congress had "its attention directed to the special case which he Act was made to meet, and considered and provided for all the circumstances of that special case." 26 A. & E. Enc. of Law (2nd Ed.) 741.

Thus, Congress not having fixed the time within which substitution should be made, it was left open for any time during the progress of the proceedings.

III.

It is noted in petitioners' supplemental brief on the motion under consideration that on page 6 that they re-invoke the court's ruling on petitioners' contention involving the asserted abatement of the present case and the running of the statute of limitations thereon, and on page 8 of the supplemental brief we find the following:

> "If it be assumed that the action was properly commenced within the period of limitation prescribed, as required by the provisions of the Act, and that said action was pending at the time the subdivision took effect, then, of course, subdivision (h), known as the Winslow Act, would have application and relieve the case of all embarrassment in respect to substitution."

That the action was "properly commenced" as against petitioners' contention that it was brought in Mrs. Preston's individual capacity, we point out, as was done on oral argument, that ever since M. K. & T. v. Wulf, 226 U. S. 570, 57 L. Ed. 355, wherein, in an opinion by Mr. Justice Pitney, it was held that changing a suit from a reliance on State to Federal law, and setting up allegations as to the injury arising in interstate commerce, was a "change in form rather than in substance," this court has consistently followed such holding, as will appear in Seaboard Air Line v. Renn, 241 U. S. 290, 60 L. Ed. 1006, in an opinion by Mr. Justice Van Deventer, and in N. Y. Central v. Kinney, 260 U. S. 340, 67 L. Ed. 294, opinion by Mr. Justice Holmes.

In fact, counsel for petitioners admitted at the bar of the court that the action was brought in such form in Mrs. Preston's indivivdual capacity as was amendable within the purview of the above decisions, but based his contention entirely on a more restricted meaning sought to be attached to the words "properly commenced."

The rule of liberal construction contended for in remedial statutes such as the Winslow Act will be found clearly set out in Danforth v. Groton Water Company, 178 Mass. 472, 59 N. E. 1033, 86 A. S. R. 495, Dunbar v. Boston and Pacific R'y Co., 181 Mass. 383, 63 N. E.

916, and Robinson v. Robins Dry Dock & Repair Company, 238 N. Y. 271, 144 N. E. 579, and which decisions, in the liberal rules of construction therein announced, go to the extent of holding that the legislature has power to allow even the statutes of limitation to be relieved against by calling a liability into being where there was none before "if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small," as ruled by Mr. Justice Holmes in Danforth v. Groton Water Company, *supra*, as the then Chief Justice of the Supreme Court of Massachusetts.

And we might add, of course the United States government could waive limitation as against it. 39 Cyc. 780, Note 58.

This action having been properly commenced, and pending at the time of the termination of Federal control, it would have, sans the 1899 Act, continued under subdivision (d) of the 1920 Transportation Act, and when the 1899 Act was repealed by the Winslow Act, it clearly related back and prevented any abatement or the operation of any statute of limitation Dougherty et al. v. Payne, 291 Fed. 60, 61; Moore v Hines, 135 Miss. 842, 100 Southern 392.

In addition to the contention hereinabove made to the effect that the action was "properly commenced," attention is called to the query of counsel for petitioners by Mr. Acting Chief Justice Holmes as to whether or not the words "properly commenced" did not relate to the defendant, an anticipation of the very contention made by counsel for respondent as set out in the brief.

It may be that this subdivision of this supplemental brief goes slightly beyond the sole question involved

under the motion to substitute, but the questions were projected by petitioners' supplemental brief, and all are so closely interrelated as to be difficult of separate treatment.

It is respectfully submitted that the motion to substitute should be granted.

Respectfully submitted,

JAS. W. WAYMAN,

ROBT. L. COLE,
Attorneys for Respondent,
Mrs. Mary Preston.

The undersigned counsel for petitioners acknowledge receipt of a copy of the foregoing supplemental brief of respondent and waive service thereof.

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Attorneys for Petitioners.

ADDENDA

On The Merits.

With the kindly consent of counsel as indicated below, and with a like hoped for indulgence on the part of the court, to which end leave is respectfully prayed, it is desired to submit the following additional authorities and considerations to which attention was directed on oral argument, and which it is desired, for the convenience of the court, to present herein:

On oral argument we called the court's attention to the following two cases, additional to those cited in respondent's brief, and which cases we think the court took on their brief:

Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 66, 24 Sup. Ct. 24, 48 L. Ed. 99.
Western & Atlantic Railroad Co. v. Hughes, 278 U. S. 496, 49 Sup. Ct. 231, 73 L. Ed. 473.

With regard to Choctaw, Etc., Company v. McDade, *supra,* a case in which liability was predicated on an alleged striking of McDade by an iron water spout hanging over the track, Mr. Justice Sutherland asked counsel for respondent if there was not evidence of injuries to McDade's head, indicating that the water spout hit him, as to which detail counsel was not in position to state off hand, but on looking at the case since he finds the following:

> "There was also testimony tending to show, from the location of the water spout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging water spout."

As stated on oral argument, however, and as presented again here, the case was cited not only as one dependent upon circumstantial evidence, but also to show there was no necessary incongruity between a party being struck or caused to fall under a moving train at one place, and his body being found some distance away, since in the McDade case his body was found some 675 feet beyond the tank, and in the case at bar, as we recall the record, Preston was found some block or so from the end of the loose rail where his hat and lantern were discovered.

As stated on oral argument, when an inanimate object falls, given the same circumstances, it will always fall the same direction, but when a man finds himself falling, in an effort to save himself, he will assume many surprising and unexpected attitudes and positions, and in such cases it is impossible to follow out all of the gruesome details of the death struggle.

As to Western and Atlantic Railroad Company v. Hughes, *supra,* Mr. Justice Van Deventer asked if the proof did not show that Hughes' head hit one of the uprights of the bridge, to which we replied that it did, and added that likewise the proof indubitably showed that Preston was killed by being run over by the train, and that the question in the Hughes' case was whether the evidence, consisting solely in circumstances, was sufficient to warrant the inference that Hughes was caused to fall by the sag in the track just before the approach to the bridge, and likewise in the Preston case, was whether the evidence was sufficient to warrant the inference of Preston tripping over the rail.

As stated in the argument, the record in the Hughes' case was withdrawn by counsel from the Supreme

Court Clerk's office and taken to the hotel and carefully read, while in Washington, and the first and chief witness for the plaintiff said it was mere guess work on his part as to whether this sag, or in fact, as to what, caused Hughes to fall.

It might be added that the Coogan case, on which petitioners so strongly rely here, was cited in the Hughes case on the question that the Federal law applies, and which shows that that case was present in the mind of this court in the disposition of the Hughes case.

There was one distinction in the Coogan case, to which we neglected to call attention in our original brief, and that was that Coogan was expected to go between the cars about 15 feet from the place where he was found, and as to which Mr. Justice Butler said that "one between cars coupling the airholes is very liable to be run over if the train is unexpectedly moved."

In the Preston case the undisputed evidence showed that where the end of the loose rail was located and adjacent to which the hat and lantern were found, Preston had no business to go between the cars. True, counsel for petitioners sought to show that he was expected to be 110 feet further south down the track in the direction in which his body was found for the purpose of making a coupling, but the great weight of the evidence was against that contention, and the undisputed evidence shows his hat and lantern were found some 100 or 110 feet north of such point, showing he never reached it for the purpose of making such coupling.

On the question of where the hat and lantern were found, we desire to quote the following from the testi-

mony of T. C. Morris, defendant's witness, and which we should have inserted on page 6 of respondent's brief at the point where we were answering petitioners' contention that "there is some confusion as to where" the hat and lantern were found:

> "I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was farther over to the left but just about the same distance from McKinney Street. *The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street.*" (R. 79.) (Italics ours.)

This witness had previously testified: "I saw this young fellow pick up the hat." * * * (R. 77.) And also: "I saw the lantern picked up also. I was with him at the time that was picked up." * * * (R. 78.)

Respectfully submitted,

JAMES W. WAYMAN,

ROBERT L. COLE,
Attorneys for Respondent,
Mrs. Mary Preston.

The undersigned counsel for petitioners acknowledge receipt of a copy of the foregoing supplemental brief of respondent on the merits and waive service thereof; and agree that respondent may file the same subject, of course, to its being agreeable to the court.

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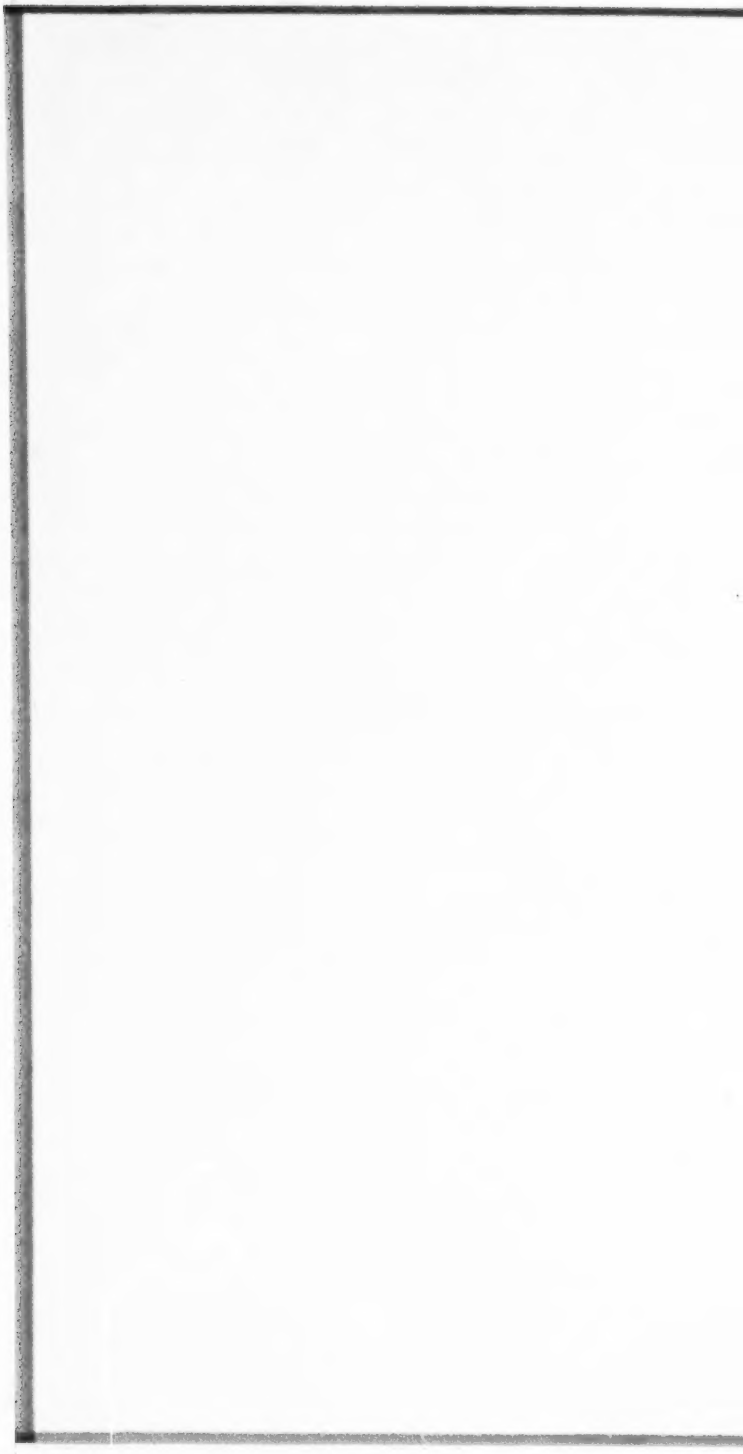
Attorneys for Petitioners.



SUPREME COURT OF THE UNITED STATES.

No. 188.—October Term, 1929.

James C. Davis, Federal Agent, Petitioner,
vs.
Mary Preston, Administratrix.

On Writ of Certiorari to the Supreme Court of the State of Texas.

[February 24, 1930.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This proceeding relates to an action brought in a state court of Texas to recover for the death of a railroad employe occurring during federal control,—while the railroad was being operated by the Director General. The action was begun by the deceased's widow, in her personal right, against Walker D. Hines, as Director General; but by amendments and substitutions the action came to be one prosecuted under the Federal Employers Act of 1908, c. 149, 35 Stat. 65, by the widow, as administratrix of the deceased's estate, against James C. Davis, as Federal Agent. Judgment went against the latter and on successive appeals there was an affirmance by the Court of Civil Appeals and the Supreme Court of the State. The final affirmance included a provision adjudging the corporate surety on the appeal bond jointly liable with Davis, as Federal Agent, for the costs in the two appellate courts.

Within the allotted three months Davis, describing himself as Federal Agent, and the surety company petitioned this Court for a review on certiorari, and the petition was granted.

It now appears that when the petition was presented Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon,—thereby making the judgment unenforceable against Davis and possible of satisfaction only after the substitution of his successor, Mellon. Therefore Davis was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do either had passed to his successor in office. *Florida ex rel. Wailes* v. *Croom*, 226 U. S.

309; *Taylor* v. *Savage*, 1 How. 282, 286; *Dolan* v. *Jennings*, 129 U. S. 385, 387; *McClane* v. *Boon*, 6 Wall. 244.

It follows that the writ of certiorari granted on the petition of Davis was improvidently allowed and must be dismissed. The fact that the surety company joined in the petition cannot alter the result. While the company was adjudged liable for the costs in the two appellate courts, that feature of the judgment of affirmance is not made a ground of complaint. Nor does it enable the company to complain of the judgment in other particulars. *Smith* v. *Indiana*, 191 U. S. 138, 149-150.

A motion is now made by Andrew W. Mellon, as Federal Agent, for his substitution in the present proceeding in the place of Davis. But the motion must be denied. The succession in office, as now appears, occurred before there was any effort to obtain a review in this Court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.

The provisions relating to substitution which were added to section 206 of the Transportation Act of 1920 by the act of March 3, 1923, c. 233, 42 Stat. 1443, are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they disclose no purpose either (a) to enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, or (b) to modify or enlarge the prescribed statutory period for invoking the reviewing power of this Court.

Motion for Substitution denied.
Writ of Certiorari dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.